destroying rights acquired under and contemplated by the patent statutes, are confiscatory, and far exceed the contemplation of the Sherman and Clayton Acts.

Respectfully,

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(Clerk's Note—The opinion is printed as a Separate Volume).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. [redacted] 8

BALL BROTHERS COMPANY, FRANK CLAYTON BALL, GEORGE A. BALL, et al., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the District Court of the United States for the Northern District of Ohio, Western Division.

BRIEF OF APPELLANTS.

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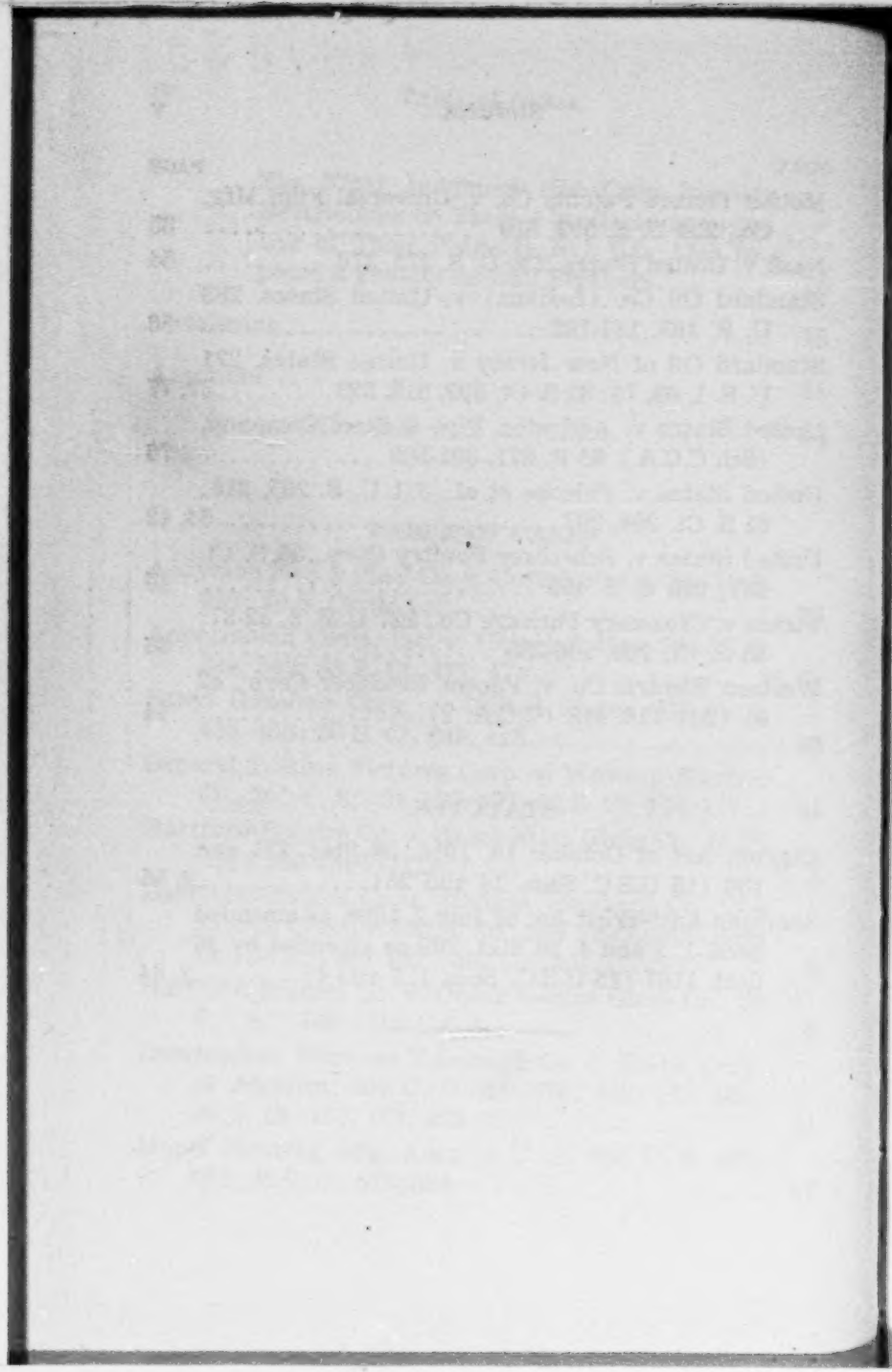

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 13.

BALL BROTHERS COMPANY, FRANK CLAYTON BALL, GEORGE A. BALL, et al., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the District Court of the United States for the Northern District of Ohio, Western Division.

BRIEF OF APPELLANTS.

OPINION OF THE TRIAL COURT.

The complaint in this cause was filed December 11, 1939 in the District Court of the United States for the Northern District of Ohio, Western Division. The cause came on for trial on March 3, 1941. The trial ended on February 27, 1942 and on August 25, 1942 the District Court filed its opinion which is reported in 46 F. (Sup.) 541.

JURISDICTION.

The jurisdiction of this Court to review the judgment of the Trial Court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167; 15 U.S.C. Sec. 29), and section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U.S.C. Sec. 345). Probable jurisdiction of this appeal was noted by this Court on March 1, 1943. The final judgment of the District Court was entered on October 8, 1942 and the petition for appeal was filed and allowed on December 3, 1942.

STATUTES INVOLVED.

This is a civil action initiated by the Government of the United States under the Anti-Trust Laws—sections 1, 2 and 4 of the Sherman Act and section 3 of the Clayton Act. To wit: the act of July 2, 1890 as amended, sections 1, 2 and 4, 26 Stat. 209 as amended by 36 Stat. 1167 (15 U.S.C. secs. 1, 2 and 4) and the act of October 15, 1914, 38 Stat. 731.*

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* The statutes are set out in the appendix attached hereto.

STATEMENT OF THE CASE.

The action originally involved twelve corporate defendants and more than one hundred individual defendants. Ball Brothers Company is named in the complaint as one of the corporate defendants and Frank C. Ball, George A. Ball, E. Arthur Ball, W. H. Ball, Edmund F. Ball, A. M. Bracken and Fred J. Petty were originally included among the individual defendants. On motion of the Government, the complaint was dismissed as to E. Arthur Ball and A. M. Bracken. Frank C. Ball, one of the above named defendants, died subsequent to this appeal to wit: On March 19, 1943.

For convenience of reference we also note that Hartford-Empire Company, Corning Glass Works, Owens-Illinois Glass Company and Hazel-Atlas Glass Company are included among the corporate defendants in this action. Throughout the remainder of this brief, we refer to Ball Brothers Company as Ball Brothers; to the individual defendants associated with it as Ball defendants; to the Hartford-Empire Company as Hartford; to Owens-Illinois Glass Company as Owens; and to Hazel-Atlas Glass Company as Hazel-Atlas.

Early Activities of Defendants Other Than Ball Brothers.

The complaint charges that the defendants—including Ball Brothers and the Ball defendants—have violated the law by conspiring to restrain interstate and foreign trade and commerce and more particularly by acquiring and maintaining monopolies of

(a) patents covering the manufacture and licensing of glass-making machinery,

(b) the manufacture and distribution of glass-making machinery, and

(c) the manufacture, distribution and sale of glass products,

and by excluding others from a fair opportunity to engage freely and unrestrainedly in interstate and foreign trade and commerce in such machinery and glass products.

The complaint alleges and the District Court's opinion outlines a conspiracy starting in 1916 and in existence in 1932 which involved the acquisition of United States patents; the institution, prosecution and settlement of interferences; improper activities in the Patent Office; secret agreements; secret divisions of royalties and other monies collected by Hartford; threats of suits; and the bringing of suits under patents owned by Hartford and relating to glass-feeding procedures and equipment and also other forming procedures and equipment employed in the manufacture of glass containers.

The proofs disclose the acquisition by Hartford of a large number of United States patents relating to various procedures and apparatus employed in the manufacture of glassware and particularly glass containers. A number of these patents relate to particular procedure and particular apparatus for feeding molten glass, i.e., procedure and apparatus in which mold charges of molten glass are formed while suspended from the delivery orifice of the feeder and are cut while so suspended and in that way delivered to the forming machine (R. 4319, Ex. 5342, R. 4318 VI, 15032 C XXV). This procedure has been termed suspended charge or "gob feeding" and the feeders themselves have been termed "gob feeders." The above mentioned opinion makes it apparent that the subject matter of these so-called "gob feeder" patents constitutes an important part of the present case.

The complaint alleges and the District Court's opinion notes that during this period (1916 to 1932 inclusive) Hartford threatened a number of manufacturers of glass containers with suit under its feeder patents and filed a number of such suits. Reference is made to the following suits as determined by the Eighth, Sixth and Third Circuit Courts of Appeals, to wit: *Hartford-Empire Co. v. Obear Nester Glass Co.*, 39 F. (2d) 769 (8th C.C.A.); *Hartford-Empire Co. v. Nivison Weiskopf Co., The Kearns Gorsuch Bottle Co.*, and *The Lamb Glass Co.*, 58 F. (2d) 701 (6th C.C.A.); and *Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 59 F. (2d) 399 (3rd C.C.A.). All this litigation was instituted and terminated prior to March 25, 1933.

There is nothing in the complaint or the record which connects Ball Brothers, its officials or the Ball defendants with these early activities. The record, however, discloses that Ball Brothers and its officials first learned of secret agreements involving Hartford, Owens, and Hazel-Atlas during the taking of testimony before the Temporary National Economic Committee in December of 1938 (R. 3050 IV, 4279 VI; Ex. 1228, R. 3068 IV; 13816 XXI). See also page 79 of the District Court's opinion.

Allegations and Facts as to Ball Brothers and the Ball Defendants.

The complaint, supplemented by a bill of particulars, charges that Ball Brothers and the Ball defendants joined a then existing conspiracy by entering into a written agreement (Ex. 199, R. 999 II, 8877 XII) with Hartford on March 25, 1933. While the complaint refers to activities of Ball Brothers prior to March 25, 1933, the above mentioned bill of particulars (R. 93-94 I, item 3c) discloses that those activities do not constitute a part of any of the conspiracies charged by the complaint.

Ball Brothers' License Under Hartford Patents.

As to Ball Brothers and the Ball defendants, the present case centers around the agreement of March 25, 1933 (Ex. 199). Under the terms of that agreement, Ball Brothers acquired the non-exclusive right and license to employ inventions purporting to be covered by Hartford's feeder patents in the manufacture of certain lines of glass containers. It also acquired a right or license, *in the nature of an exclusive license,* to employ such inventions in the manufacture of fruit jars, i.e., wide mouth glass containers sold empty to the domestic or household trade for use by housewives in the preserving of foods.

The license to use Hartford's inventions in the manufacture of fruit jars was *not exclusive* because Hartford had previously granted Owens, Hazel-Atlas and also others the right or license to use its so-called feeder inventions in the manufacture of glass containers, including fruit jars. As a result, Hartford granted to Ball Brothers what has been termed its *residual rights as to fruit jars.* That is to say, in granting the license to Ball Brothers, as to the use of its inventions in the manufacture of fruit jars, Hartford noted the licenses it had previously granted but agreed with Ball Brothers that it would grant no other licenses to use its feeder inventions in the manufacture of fruit jars so long as Ball Brothers' license remained in force and effect.

We note that the license granted to Ball Brothers to use Hartford's feeder inventions in the manufacture of fruit jars was in accord with usual and ordinary practice and differed from the granting of an exclusive license only because it was limited to a use of the inventions in a particular field and did not exclude all others from the use of the inventions in that field.

As to this matter of residual rights, Schedule C. of the above mentioned agreement (Ex. 199; R. 8895 XII) includes a reference to outstanding licenses and rights as to the manufacture of fruit jars and lists a limited license to the Salem Glass Works for a particular type of fruit jar; a short-term license to the Gayner Glass Works limited in all to the production of 120,000 gross of fruit jars and expiring July 1, 1934; a license to Corning Glass Works limited to glass made in accordance with a particular formula; and the above mentioned licenses to Owens and Hazel-Atlas. The schedule also notes a commitment to American Thermos Bottle Company which is broad enough to involve a right to use the Hartford inventions in the manufacture of fruit jars, as that term is used in the Ball Brothers license agreement.

Ball Brothers not only paid a substantial amount to Hartford by way of damages for its use of feeders prior to the agreement of March 25, 1933 (Ex. 199), but it also paid Hartford a substantial amount as the consideration for the so-called residual rights, i.e., the covenant by Hartford that it would grant no additional licenses within the United States involving the use of its feeder inventions in the manufacture of fruit jars so long as Ball Brothers' license remained in force and effect. The record discloses the payment to Hartford of $150,000 for past infringement and of $250,000 for the so-called residual rights (Finding 385; R. 7358 X). That is to say, the agreement of March 25, 1933 (Ex. 199), under which Ball Brothers acquired the license to use the Hartford feeder inventions in the manufacture of glass containers, also constituted a settlement of Hartford's claim that Ball Brothers had been infringing its patents by the wrongful use of such inventions.

The record discloses that the controversy between Hartford and Ball Brothers as to the use of the feeder

inventions had been in existence since 1926; that Ball Brothers had been notified that the feeders employed by it infringed the Hartford patents but had denied Hartford's claims of infringement (Ex. 1181, R. 3035 IV; 13797 XXI); that Ball Brothers continued its antagonistic attitude toward Hartford's patents as late as January of 1933 (Ex. 1270, P. 6; R. 3150 V 13861, 13865 XXI); and considered accepting a license under Hartford's patents only after the Third Circuit Court of Appeals had handed down its opinion in *Hartford v. Hazel-Atlas Glass Co.* 59 Fed. 2d 399 and thereby upheld Hartford's contention as to infringement of the patent there in suit (F. C. Ball, R. 4263 VI; G. A. Ball, R. 3077 IV). That is to say, Ball Brothers did not accept a license to use the inventions of Hartford's feeder patents until some of those patents had been upheld as valid by three United States Circuit Courts of Appeals.

For the purpose of amplifying the situation surrounding the acquisition of the Hartford feeder license by Ball Brothers, we note that Ball Brothers and its officials attempted to obtain the best license possible for the money it was to pay (G. A. Ball R. 3036) and that it always took the position that it must have an exclusive license as to the manufacture of fruit jars, insofar as Hartford was in a position to give it such a license (R. 3034). The record discloses that after receiving the license under the Hartford patents, Ball Brothers continued to use so-called Ball feeders, i.e., the feeders which occasioned the controversy between Ball Brothers and Hartford and formed the basis of Hartford's charge that its patents had been infringed.

The license agreement (Ex. 199) also gave Hartford an option to purchase (1) at $100.00 per feeder any Ball feeders which Ball Brothers might desire to convey to others and (2) any of Ball Brothers' patents, relating to feeders, on the same terms upon which Ball

Brothers was willing to sell or license such patents to others (Finding 385; R. 7358 X). There is, however, nothing in the record which even indicates that Ball Brothers has ever granted a license to anyone under any of its patents or that such a license was ever requested of Ball Brothers. In this connection we note that the complaint (paragraph 163) designates Ball Brothers as a powerful potential competitor of Hartford in glass container machinery but there is nothing in the record which even indicates that Ball Brothers has furnished or has ever contemplated furnishing other glass manufacturers with glass-making machinery. It is a manufacturer of glass containers, not glass-making machinery, although it built the Ball feeders and has built other glass-working apparatus for its own use.

After Ball Brothers accepted the license (Ex. 199) under Hartford's feeder patents, it reconstructed the Ball feeders to embody some of the designs of the feeders then being furnished by Hartford, i.e., the Hartford MU feeders (R. 6601-2 IX). On the other hand, we note that while the license agreement gave Ball Brothers the right to lease and use the so-called "Hartford single feeders", there is nothing in the agreement which either required Ball Brothers to use equipment produced by Hartford or required Hartford to lease—as distinguished from sell—its feeders or other equipment to other licensees. The record discloses that Ball Brothers was still using the so-called Ball feeders during the trial of this case and that up until the trial it had not acquired any equipment furnished by Hartford. After the trial was under way it acquired two single feeders from Hartford to serve two so-called "I. S." forming machines also furnished by Hartford.

After the acquisition of Hartford's so-called residual rights as to the use of the feeder inventions in the manufacture of fruit jars, Ball Brothers protested on

several occasions about the use of Hartford feeder inventions in the manufacture of fruit jars by other Hartford licensees who did not have the license right to manufacture fruit jars under the Hartford patents. That is to say, Ball Brothers protested to Hartford because it was not fulfilling its obligation as to the matter of the so-called residual rights. In some such protests it noted the fact that the manufacturer in question was not only producing fruit jars in violation of Hartford's obligation to Ball Brothers but was also selling such fruit jars at prices below Ball Brothers' prices (Ex. 201, R. 1001; Ex. 203, R. 1003; Ex. 210, R. 1014; Ex. 213, R. 1016 and Ex. 217, R. 1019 II, 12723-43 XIX).

General Glass Company License.

General Glass Company had a license to use Hartford's feeder inventions in the manufacture of fruit jars long prior to Ball Brothers' license to use those inventions. While there is some controversy as to some of the details leading up to the surrender to Hartford of these rights by the General Glass Company, it is noted that Hartford reacquired these fruit jar rights on March 21, 1933 and paid the General Glass Company $100,000 as the consideration for the surrender (Ex. 198, 998 II; R. 8876 XII). In connection with this transaction, it is noted that the General Glass Company had never exercised its right to use the Hartford feeder inventions in the manufacture of fruit jars. At the time of the surrender of its fruit jar rights, the General Company had no intention of engaging in the manufacture of fruit jars (R. 3023 IV).

The only controversy as to this transaction which concerns Ball Brothers, is the effort on the part of the plaintiff to make it appear that during the negotiations leading up to the agreement of March 25, 1933 (Ex.

199), Ball Brothers compelled Hartford to reacquire the fruit jar rights. As to this, the Government relies strongly on a statement in Exhibit 178 (R. 975—7, II, 12, 703 XIX)—a letter dated October 10, 1932 from F. Goodwin Smith, President of Hartford, to Isaac J. Collins, President of General—which notes a conference with Ball Brothers looking toward licensing it under Hartford's feeder patents and also includes the following statement:

> "All negotiations, however, depend upon two factors,—first, that we will not license others on fruit jars for domestic household trade, and second, that General Glass will cancel the right to make fruit jars for domestic household trade."

On being shown this letter and having his attention called to the quoted portion thereof, G. A. Ball testified as follows (R. 3042 IV):

"Q. Do you remember that you imposed these two conditions?

A. I don't believe we imposed those two conditions.

Q. You don't think so?

A. No.

Q. Did Hartford impose them on itself?

A. It was making its proposition."

In connection with the letter, Exhibit 178 (R. 12703, XIX) from which the above quotation is made, we note that there is a question as to whether it was ever sent to Collins. He denies that he ever received it (R. 2979 IV).

Purchase of Knox Fruit Jar Business.

On March 23, 1933 Ball Brothers purchased the fruit jar business of the Knox Glass Bottle Company and four of its affiliated companies and those companies agreed to stay out of the fruit jar business in continental United States for a period of about fifteen years (Ex. 196, R. 997—8, II; 8871, XII). The Knox Glass Bottle Company and its affiliated companies had been refused a license to use the Hartford feeder inventions in the manufacture of fruit jars but after accepting a license to use Hartford's feeder inventions in the manufacture of other containers, the Knox companies continued to make fruit jars on so-called Knox-O'Neill machines. Underwood, President of the Knox companies, however, testified to the effect that the Knox-O'Neill machine was not a highly successful machine due to the fact that it was not brought to a point of complete development by Frank O'Neill (R. 1557 III). The testimony of Underwood bearing on the manufacture of fruit jars by the Knox companies prior to the Hartford license is as follows (R. 1522 II):

"Q. Now, did you manufacture fruit jars at that time?

A. Yes, we manufactured fruit jars.

Q. And in what plant did you manufacture?

A. We manufactured fruit jars—well, a few in most of our plants."

The allegations of the complaint are such as to suggest that a subsequent transaction between Hartford and the Knox Glass Bottle Company—i.e., the cancellation on March 29, 1933 of $44,000 in notes payable by the Knox Company to Hartford (Ex. 197, R. 998 II, 12722 XIX) —was in consideration of the agreement between Ball Brothers and the Knox Company. The record, however, does not substantiate this or any similar suggestion.

Purchase of Brockway Fruit Jar Business.

On January 23, 1933 the Brockway Glass Bottle Company obtained a license to use the Hartford feeder inventions in the manufacture of containers. The license, however, was limited as to the use of the feeder inventions and did not permit Brockway to use such inventions in the manufacture of fruit jars (Ex. 161, R. 941—2 II, 8865 XII). On April 27, 1933, Ball Brothers purchased the fruit jar business of Brockway and Brockway agreed that it would not go into the business of manufacturing and selling fruit jars in continental United States (except Alaska and New Mexico) for a period of fifteen years (Ex. 200, R. 999 II, 8901 XII). There is nothing in the record which indicates that Brockway was a potent factor in the fruit jar field or that its agreement with Ball Brothers resulted in an unreasonable restraint of trade.

Fruit Jar Rights of Gayner Glass Works.

The record is not complete as to the Gayner transaction and, as in the Court below, we amplify that record by the following statement at the request of counsel for plaintiff. At the time Ball Brothers entered into the agreement of March 25, 1933, the Gayner Glass Works had a license to make in all 120,000 gross of fruit jars not to exceed one-half gallon in capacity. This license was also limited to a single unit consisting of a Hartford single feeder and a Hartford press and blow machine. In addition, the Gayner license was a short term license, expiring on July 1, 1934. So far as recollection now serves, Ball Brothers entered into an agreement with Gayner Glass Works on May 11, 1933 and purchased for $30,000 either the remaining portion of Gayner's right to manufacture fruit jars under its Hartford license or its entire fruit jar business for

the period including May 11, 1933 and extending to July 1, 1934. A search for the written agreement as to this transaction was not successful and recollection suggests that there was no written agreement.

Hartford Released as to Residual Rights and Knox Glass Bottle Company and Brockway Glass Company Released from All Obligations Involving Fruit Jar Limitations.

On August 1, 1940, Ball Brothers entered into a so-called settlement agreement with Hartford (Ex. 5026, R. 1473-1475 II, 9527 XIII) under the terms of which it released Hartford from its obligation not to grant others the right to use its feeder inventions in the manufacture of fruit jars. On October 16, 1940, Ball Brothers released the Knox Glass Bottle Company and all of its subsidiary companies from all obligations to Ball Brothers involving the manufacture and sale of fruit jars (Ex. 5035, R. 1569 III, 9554 A XIII, and Finding 514, R. 7379 X). On October 16, 1940, Brockway Glass Company was also released from all obligations to Ball Brothers as to the manufacture and sale of fruit jars (Ex. 6093, R. 6642, 9864 A XIII, and Finding 515, R. 7379 X). That is to say, before any testimony was taken in the present case, Ball Brothers attempted to readjust conditions so as to avoid, as far as possible, the continuation of those things objected to by the Government and referred to in the complaint.

By the terms of the August 1, 1940 agreement (Ex. 5026) Hartford, in effect, repurchased from Ball Brothers the residual rights as to the use of the feeder inventions in the manufacture of fruit jars and thus placed itself in the position of extending to its licensees the right to use its feeder inventions in the manufacture of fruit jars. The agreement of August 1, 1940 also

extended Ball Brothers' rights to use Hartford's feeder inventions in the manufacture of glass products and cancelled the clause of March 25, 1933 agreement (Ex. 199) under the terms of which Hartford acquired an option to purchase Ball patents relating to feeders or feeding procedures. Under the agreement, Hartford and Ball Brothers mutually released each other from all claims arising out of past representations made by either party to the other or otherwise arising out of the agreement of March 25, 1933 and Hartford paid to Ball Brothers $425,000. The agreement of March 25, 1933 as modified by the settlement agreement of August 1, 1940, is still in effect (Finding 513, R. 7379 X).

The agreement of August 1, 1940 not only placed Hartford in the position of granting the right to use its feeder inventions in the manufacture of fruit jars to Knox Glass Bottle Company and its affiiliated companies, to the Brockway Glass Company and to the General Glass Company and/or its successor, but also to all of its other licensees under its feeder patents. It is our understanding that Hartford has extended that right to all such licensees. (Ex. 5025, R. 1472—3 II, 14731 XXIV).

Alleged Oral Agreement as to Limitations on Fruit Jar Production of Owens and Hazel-Atlas.

Paragraph 156 of the complaint (R. 46) charges an oral agreement, i.e., a "gentleman's agreement" involving Hartford, Ball Brothers, Owens and Hazel-Atlas and in which Owens and Hazel-Atlas agreed to limit their fruit jar production to 100,000 gross per year for Owens and 300,000 gross per year for Hazel-Atlas. The proofs disclose that during the period of the negotiations which culminated in the agreement of March 25, 1933 (Ex. 199), Ball Brothers, on learning that both Owens and Hazel-Atlas had the unlimited right to use Hart-

ford's feeder inventions in the manufacture of fruit jars, expressed the desire that each such company be limited—as to production under the Hartford license—to a specific quota, namely 100,000 gross per year for Owens and 300,000 gross per year for Hazel-Atlas.

This desire or demand on the part of Ball Brothers apparently occasioned conferences and discussions between Hartford, Owens and Hazel-Atlas. The record contains some testimony and several exhibits bearing on this and indicates a willingness on the part of Hartford, Owens and Hazel-Atlas to meet the desires of Ball Brothers as to the production limitations. It appears that a suggestion to amend the licenses theretofore granted by Hartford to Owens and Hazel-Atlas (Ex. 1743, R. 4019 VI, 9509 A XIII) brought out a counter-suggestion by Carter (an officer of Owens) to the effect that the quota limitation could be covered by a side agreement on the part of Owens to limit production under its Hartford license (Ex. 189, R. 992—3 II 12713 XIX). There, however, is nothing in the record which even indicates that Ball Brothers knew of these suggestions or learned of them prior to the trial of this cause. The record also discloses that Hazel-Atlas was willing to submit to a limitation such as suggested by Ball Brothers, provided their attorneys approved and provided also the limitation would permit a production of fruit jars as great as the usual production of Hazel-Atlas for normal years and would not limit production during abnormal years (McNash R. 2424 IV and Ex. 191; R. 994 II 12717 XIX; Ex. 944; R. 2423 13591 XXI).

A question as to the legality of a deal, such as suggested by Ball Brothers, was raised by Hornbrook, Ball Brothers' attorney, (Brown R. 4021, 4051-4053). As a result an opinion was furnished to Hornbrook and also to W. J. Belknap, one of Hartford's attorneys, by Brown, also one of Hartford's attorneys. Before the

preparation of the agreement of March 25, 1933 between Hartford and Ball Brothers (Ex. 199), and during a conference in New York, Hornbrook said there could be no arrangement or agreement for a restriction of production and the matter was dropped (G. A. Ball R. 3044-5, 3049 IV; F. C. Ball R. 4268-9-70 VI).

Purchase of Three Rivers Glass Plant.

In the fall of 1936 Ball Brothers purchased the Three Rivers Glass Plant (located in Live Oak County, Texas) from the receiver (Henderson Coquat) of the Three Rivers Glass Company. The record discloses that Three Rivers Glass Company was a licensee under the Hartford patents; that it was behind in its royalty payments to Hartford; and that Hartford had filed suit for specific performance asking for the return of its leased machinery and an accounting for its unpaid royalties. In 1934 Coquat contacted G. A. Ball in his effort to sell the Three Rivers plant and it appears that there was an understanding that Ball Brothers would take over the plant provided Coquat could get the bondholders to accept an amount which G. A. Ball stated he would pay for the bonds (Ex. 1198, R. 3057 IV 13804 XIX). The various exhibits relied upon by the Government indicate that Hartford was to some extent interested in a deal which would terminate the receivership of the Three Rivers Glass Company and place the plant in the hands of some reliable operating company. There, however, is nothing in the record which indicates cooperation between Hartford and Ball Brothers in connection with Ball Brothers' purchase of Three Rivers, except possibly in connection with some reduction in the amount of its claim against the Three Rivers Company in an effort to get the price of the plant to a figure which would be acceptable to Ball Brothers (R. 3058-9 IV).

After the purchase, the Three Rivers plant was operated for about a year and was then closed down for repairs, including a reconditioning of the glass melting tank. The tank was reconditioned and other repairs were made although the plant has not been used to manufacture glassware since the reconditioning and up to the time of submitting proofs in connection therewith because the trade did not justify its operation (G. A. Ball R. 4077 IV).

Ball Brothers Has Never Had a Monopoly as to the Production or Sale of Fruit Jars.

Paragraph 164 of the complaint (R. 48), in effect, alleges that the defendants Ball Brothers, Owens and Hazel-Atlas have had and now have a monopoly of the manufacture and distribution of fruit jars and that such monopoly has grown out of the conspiracy relating to patents and patented machines alleged in the complaint. Exhibit 947 (R. 2444 IV 13593 XXI) sets forth the fruit jar production of the three companies named for the years 1928 to 1939, both inclusive, as contrasted with the total fruit jar production for those years, and discloses that the aggregate production of the three companies varies from year to year from about 75% to about 80% of the total fruit jar production in the United States. That is to say, the companies, designated by the plaintiff as the three largest manufacturers of glass containers in the United States, aggregate approximately 80% of the fruit jar business of the country, whereas the Kerr Glass Company furnishes upward of 20% of the fruit jars manufactured and sold within the United States (See page 83 of the District Court's opinion).

The Kerr Glass Company is neither a defendant in this case nor a licensee under Hartford's feeder patents.

According to plaintiff's brief in the court below, it employs obsolete equipment in the manufacture of fruit jars (Brief p. 328). Whether or not this is the fact, the record discloses that the Kerr Company employs unpatented flow or stream feeders and unpatented forming machines and that it sells fruit jars in competition with the defendants Owens, Hazel-Atlas and Ball Brothers (R. 6610, 6611, IX).

In urging that the defendant Ball Brothers occupies a dominant position in connection with the manufacture and sale of fruit jars, plaintiff stresses the fact that it acquired an exclusive license to use the Owens suction machine inventions, in the manufacture of fruit jars, as early as 1912. This license was renewed in 1924 (Ex. 195 R. 8869 XII) but expired on June 6, 1933 and was not renewed by Ball Brothers thereby placing Owens in the position of using its suction machines in the manufacture of fruit jars.

It will be noted that Ball Brothers' license to use the inventions of the Owens suction machine patents, overlapped the license it acquired on March 25, 1933 from Hartford. Because of this the Government urges that Ball Brothers has enjoyed a monopoly, as to the production and sale of fruit jars, since 1912. The above mentioned Exhibit 947 discloses that this is not the fact. Aside from this, however, the license agreements (Exs. 195, 199, 5210, 5211 and 5213) disclose that Ball Brothers' so-called exclusive licenses were not, in fact, exclusive as to the production of fruit jars. The licenses to employ the Owens inventions in the manufacture of fruit jars were, as the statement implies, limited to the use of specific patented inventions, i.e., specific patented procedures and/or machines. That is to say, the Owens patents covered specific inventions and did not include within their scope apparatus or procedures which were

old or were in use at the time the inventions, forming the basis for the patents, were made. Ball Brothers' licenses were, of course, no more extensive than the patents under which they were granted. They, therefore, did not extend to all procedures and apparatus capable of being employed in the manufacture of fruit jars. They, of course, had absolutely nothing to do with the sale of fruit jars.

The rights acquired by Ball Brothers to use the Hartford feeder inventions in the manufacture of fruit jars were much less comprehensive than the rights under the Owens patents. As noted throughout the record, these rights were shared with Owens, Hazel-Atlas and others. In this connection, Schedule C forming a part of the Hartford-Ball Brothers agreement (Ex. 199, R. 8895 XII Schedule C) clearly discloses that Ball Brothers' right to use Hartford's inventions in the manufacture of fruit jars was far from an exclusive right. We note this as a preliminary to the statement that the right granted to Ball Brothers to use Hartford's feeder inventions took nothing from the public that the public had prior to those inventions, if Hartford's patents covering the feeder inventions are — as the Courts have found them to be—valid patents. In this connection we note that the Government does not question the validity of the Hartford patents here involved (R. 4288 VI). This, of course, means that the Government concedes the validity of those patents, for the purpose of the present case.

The testimony of F. G. Littler bears on Ball Brothers' activities in the manufacture of fruit jars (R. 6557-6561 IX). His reference to the chart, Ex. 6077A-E (R. 6566 IX, 16236 XXVIII), discloses that from the year 1910 to 1919 inclusive, Ball Brothers' plant at Muncie, Indiana was so equipped that three distinct procedures for producing fruit jars were available for use (R.

6560-61 IX). As a matter of fact, this testimony discloses that, during the period in question, the three distinct procedures for manufacturing fruit jars were at times simultaneously employed by Ball Brothers. The procedures involved Owens suction machine procedures then covered by the Owens patents, hand gathering procedures unpatented and open to any member of the public, and procedures involving the use of flow or stream feeders which the record also indicates were not patented and, therefore, could be employed by any member of the public.

After the termination of the Owens license in June of 1933, Ball Brothers continued to use the Owens suction machines in the manufacture of glassware, including fruit jars, up until October of 1940 (R. 6561 IX), but it paid no royalties because of the use of those machines (R. G. A. Ball 3075 IV; Myers 6591 IX). Thus it is apparent that subsequent to the termination of the Owens license, Ball Brothers and other members of the public had open to them the then unpatented Owens machine, the old hand gathering procedures and the flowing stream procedures. All these procedures are capable of being effectively employed in the manufacture of commercial fruit jars and, according to the record, the last named procedure is today being employed by the Kerr Glass Company (R. Milner 6610-6611 IX).

The witness Milner in commenting upon the various types of apparatus employed at Ball Brothers' plant, expressed the opinion that the *press and blow forming machine* is a highly desirable machine for making wide mouth ware such as fruit jars (R. 6604; 6608-9 IX) and he also noted that the Kerr Glass Company employs press and blow forming machines in the manufacture of fruit jars (R. 6610 IX). The record also discloses that the Kerr Glass Company employs an old type of feeder with these press and blow machines, that is to

say, a feeder such as was used as early as 1916, 1917 or 1918 (R. 6610 IX). There has been no patent on the Mason fruit jar since the early 80's (R. 6546 IX), consequently the Kerr Glass Company has not been hampered by any patent monopoly in its manufacture, distribution or sale of fruit jars.

Thus it is apparent that the record refutes plaintiff's contention that Ball Brothers or Ball Brothers, Owens and Hazel-Atlas together have a monopoly on the production of fruit jars. In this connection we again note that Ball Brothers has used unpatented machines and procedures in the production of fruit jars and that the Kerr Glass Company is using unpatented machines and procedures in the production of fruit jars. It is, therefore, suggested that such patent monopolies as are involved in the present case, do not extend to the production of glass containers generally or even to the production of fruit jars. In making this statement we are, of course, not attempting to rebut the inference that Ball Brothers is of the opinion that a commercial advantage is gained by the use of the feeders and feeder procedures purporting to be covered by Hartford's feeder patents.

The Judgment Is Broader Than Contemplated by the Anti-Trust Statutes as Those Statutes Have Been Interpreted by This Court and Is Largely Punitive Rather Than Corrective.

In stating the case we note and urge that the final judgment (R. 7653 X) goes far beyond the contemplation of the law. It not only deprives Ball Brothers and the Ball defendants of the benefits and advantages to be derived under our statutes relating to inventions and patents but it also deprives those appellants of freedom of action in connection with property rights which are

in no way involved by the charges of the complaint or by the proofs submitted. Paragraphs 44 and 58 of the judgment also have the force and effect of imposing a specific penalty on Ball Brothers and under conditions such as to deprive that company of its right of appeal before the order imposing the penalty became effective.

Paragraphs 9, 21, 23, 24, 25, 26, 27, 29, 36A, 36B, 43, 44, 51, 52, and 58 of the judgment are all specifically objected to as broader and more drastic than required by the circumstances of the present case and even though it be assumed that the findings and holdings of the Trial Court are all correct and proper.

As to paragraph 9 of the judgment (R. 7660 X) we also note that the complaint and the record fail to connect Ball Brothers and/or the Ball defendants with any violation of the Clayton Act; but, nevertheless, Ball Brothers and the Ball defendants are enjoined from engaging in or participating in practices, contracts, relationships or understandings or claiming any rights thereunder, having a tendency to continue or revive any of the aforesaid violations of the *Clayton Act*. In other respects we concede that paragraph 9 is justified by the findings and the opinion of the District Court.

Paragraph 21 of the judgment (R. 7665 X) is objected to as limiting and restricting Ball Brothers and the Ball defendants in the future conduct of its and their lawful business. The paragraph is couched in broad terms and is, therefore, somewhat vague or indefinite. In any event, as worded there is a question as to its scope. It appears to be of such scope as to deprive the defendants of their ordinary legal rights in connection with the sale of such glass-making machinery as they may own and even though the sale may be nothing more than that of a second hand machine. Paragraphs 23 (R. 7666) and 25 (R. 7668) are likewise so worded

as to raise a question as to their scope. In connection with these three paragraphs it is also noted that there is nothing in the record which even indicates that Ball Brothers or any Ball defendant has ever been in the business of selling or otherwise distributing glass-making machinery or has ever sold any such machinery.

Paragraphs 24, 26, 29, 51 and 52 of the final judgment (R. 7667, 7669, 7672, 7686-7) are also objected to because they deprive Ball Brothers and the Ball defendants of the benefits and advantages to be derived under our patent laws and under conditions such as to far exceed what appears to us to be required by the circumstances of this case, even though it is conceded that it is desirable or even necessary to place some limitation on transactions concerning the specific patents and inventions involved by the charges of the complaint. Ball Brothers' inventions and patents played no active part in any transaction here under consideration. Some such inventions and patents are involved in the present case but only as subject matter of a condition of the license agreement of March 25, 1933 (Ex. 199); but even so, paragraph 24 of the judgment is such as to deprive Ball Brothers and each of the Ball defendants of the benefit of such patent monopoly as it or they may have acquired or may be in the way of acquiring under the laws of this country, as to all of the inventions now owned by it or them and relating in any way to the manufacture of glassware. There is no limit on the period of this deprivation. Then too there is nothing in the record which indicates that any invention owned by a Ball defendant, other than Ball Brothers, is in any way involved by this litigation.

In addition, paragraph 24 is so worded as to deprive both Ball Brothers and the Ball defendants of the full benefit of any future invention they may acquire, if such invention relates in any way to glassware or the manu-

facture of glassware. Paragraph 24 also may impose the burden on each invention-owning defendant of providing drawings and patterns in connection with machines or mechanisms for taking advantage of such invention and merely because an invention relating to glass-making machines or operations is now owned or is, in the future, acquired by such defendant.

Paragraphs 26, 29, 51 and 52 of the judgment are all of different scope but they are all of such form and substance as to deprive both Ball Brothers and each of the Ball defendants of their rights relating to inventions and patents and even though the inventions or patents involved by the paragraphs have played no part in the transactions here under consideration or are not as yet in existence. It is our contention that the paragraphs here mentioned (24, 26, 29, 51 and 52) are of such form and scope that they are confiscatory, impose penalties and cannot be considered as merely tending to prevent and restrain future violations of the Sherman Act.

Paragraph 43 of the judgment (R. 7683) is to the effect that Ball Brothers is to continuously hold itself in readiness to divest itself of the Three Rivers plant located at Three Rivers in the County of Live Oak, Texas. Our objection to this paragraph is based on the contention that the record fails to connect the purchase by Ball Brothers of the Three Rivers plant with any conspiracy involving Hartford or any of the other defendants in this case and that, therefore, the paragraph exceeds the requirements of the circumstances here involved, and even though it is assumed that other acts of Ball Brothers contributed to the conspiracy alleged by the complaint.

As to paragraph 27 (R. 7670) of the judgment—which relates to the cancellation of all agreements—we

note that the agreement of August 1, 1940 between Ball Brothers and Hartford (Ex. 5026) not only modifies the previous agreement of March 25, 1933 (Ex. 199) but was also an attempt to remove from that earlier agreement all terms and conditions condemned or even criticized by the Government in this case. It is, therefore, contended that independently of the legality or illegality of the earlier agreement, that agreement, as modified by the agreement of August 1, 1940, is a legal agreement. Its cancellation will neither increase competition nor benefit the public in any other way.

Under the terms of paragraphs 44 and 58 of the judgment (R. 7683 and 7692), Ball Brothers was compelled to pay the Clerk of the District Court of the Northern District of Ohio, Western Division, $425,000 and under conditions such that it had no right of appeal from the order compelling such payment. The paragraphs are objected to for this reason and also because they have the effect of imposing a penalty on Ball Brothers not contemplated by law.

SPECIFICATION OF ERRORS.

These appellants are relying upon all of the errors assigned by them—forty-eight in number—and set forth on pages 7870 to 7881 (Vol. X) of the record. All such errors are material to the issues here discussed and they are grouped by the following specification of errors:

1. The District Court erred in holding that Ball Brothers and the Ball defendants were parties to the conspiracy charged, and in entering judgment against them (Assignments of Error Nos. 1 to 9, both inclusive, 28, 33, 34, 35, 36, 42, 43, 44, 46 and 47).

2. The District Court erred in failing to hold that all material issues herein as to these appellants were rendered moot by the settlement agreement of August 1, 1940 (Ex. 5026) and by the release on October 16, 1940 of Brockway Glass Company (Ex. 6039) and of Knox Glass Bottle Company and its associated companies (Ex. 5035). (Assignments of Error Nos. 36, 37, 39, 40 and 41).

3. The District Court erred in holding that the agreement between Ball Brothers and Hartford entered into on March 25, 1933 as amended by the agreement of August 1, 1940, is unlawful and in cancelling the same and in enjoining the observance thereof. (Assignments of Error Nos. 28, 33, 34, 36, 37, 38, 42, 43, 44, 46 and 47).

4. The District Court erred in holding that there was an oral understanding between Ball Brothers and other defendants to the effect that Hazel-Atlas and Owens would each restrict its annual distribution of fruit jars. (Assignments of Error Nos. 29, 30, 31, 32, 44 and 45).

5. The District Court erred in holding that the acquisition of the Three Rivers Glass Company by Ball Brothers violated Sections 1 and 2 of the Sherman Act and was in furtherance of a plan to maintain a monopoly in the production and distribution of fruit jars and in directing that all assets pertaining to the manufacture of glassware, now owned by Ball Glass Corporation at Three Rivers, Texas, be offered for sale. (Assignments of Error Nos. 20 and 21).

6. The District Court erred in ordering Ball Brothers to pay to the Clerk of the District Court, all monies received by it from Hartford pursuant to the agreement of August 1, 1940. (Assignments of Error Nos. 22 and 23).

7. The District Court erred in that its order of injunction against these appellants is unnecessarily drastic, is confiscatory and imposes restrictions and penalties not warranted by the record and contrary to legal principles heretofore announced by this Court in similar cases. (Assignments of Error Nos. 10 to 19, both inclusive, and 22 to 27, both inclusive).

SUMMARY OF ARGUMENT

These appellants contend that there is no substantial evidence connecting them with any conspiracy or a conspiracy such as is alleged by the complaint; that they had no knowledge of the activities of the defendants, other than Ball Brothers and the Ball defendants, which are alleged in the complaint and which the complaint charges constitute or contribute to an unlawful conspiracy; that the early activities of Ball Brothers, referred to in the complaint, were not in violation of the law or in furtherance of any conspiracy; that the acts and practices of Ball Brothers and/or the Ball defendants which are charged by the complaint as contributing to an existing conspiracy were irrevocably abandoned prior to the trial of this cause and all material issues with respect thereto were, therefore, rendered moot; that the position of Ball Brothers in the glass container industry is not the result of any unlawful restraint of trade; and that the final judgment as to these appellants and each of them is unnecessarily drastic, is unreasonable, is confiscatory and imposes restrictions and penalties not warranted by the evidence or by law and not warranted even though it is assumed that the District Court's findings of fact and conclusions of law, as to these appellants, are correct.

ARGUMENT.

Point I.

The District Court Erred in Holding That Ball Brothers and the Ball Defendants Joined an Existing Conspiracy.

Paragraph 143 of the complaint (R. 42 I) and the aforementioned bill of particulars (R. 72, 93) makes it apparent that plaintiff's charges as to these appellants center around the agreement of March 25, 1933 (Ex. 199). We, however, note that the major portion of the complaint and by far the greater portion of the record bears on acts and activities of corporate defendants, other than Ball Brothers, during the period including the years 1916 and 1932. There is nothing in the complaint which bears on Ball Brothers' activities during this period in such a way as to characterize Ball Brothers or any of the Ball defendants as conspirators. That is to say, there is nothing in the complaint which indicates or suggests that Ball Brothers' early activities contributed to the alleged conspiracy referred to in paragraph 143 of the complaint.

On the other hand, the complaint does stress early activities of Ball Brothers and notes the fact that it enjoyed an exclusive license to use the Owens suction machines in the manufacture of fruit jars (Paragraph 144, R. 43). It also notes that Ball Brothers purchased the business and patents of the Schram Manufacturing Company in 1925 and the business and patents of the Pine Glass Company in 1929 (Paragraph 145) and the implication is that both companies were purchased merely to eliminate competition in the manufacture of fruit jars. Paragraph 51 of the answer (R. 250) admits

both purchases but denies all other averments of paragraph 145 of the complaint.

While we contend and urge that the transactions as to the Schram Manufacturing Company and the Pine Glass Company are neither pertinent nor material to the issues of this cause, nevertheless we note that the only direct testimony concerning these transactions is that of G. A. Ball. He testified in substance, that the Schram Glass Company manufactured fruit jars and some packer's ware and that there were two reasons for purchasing the plants of the Schram Company. First, Ball Brothers wanted more capacity and this could be obtained more quickly by purchasing going plants than by building new ones and, second, by the purchase Ball Brothers obtained an established trade in packer's ware and also obtained customers more quickly than would have been the case in connection with the building of new plants (R. 3071 IV). He also testified that the purchase of the Pine Company was for the same reasons except that the Pine Company manufactured fruit jars only. In connection with the purchase of the Pine plant he stated, "We wanted more capacity on jars, that is, we wanted more production for our furnace than we had * * * and Pine was advantageously located, geographically, for us to get the manufactured production to our customers." (R. 3071 IV). Thus it is apparent that the purchase of both these plants was for the purpose of extending the activities and/or the facilities of Ball Brothers. Whether or not this is pertinent to the present issues, we note that there is nothing in the record which even tends to controvert G. A. Ball's testimony.

Paragraph 145 of the complaint alleges that both the Schram and the Pine plants were closed down by Ball Brothers. This is denied by paragraph 51 of the

answer. In addition, the record discloses that it is usual to close down glass plants for repairs and reconditioning. This was brought out by the testimony of G. A. Ball in connection with both the Schram and Pine plants (R. 3079).

The page of the record last noted discloses an attempt by the plaintiff to prove its allegation as to the closing down of these plants, but it and the following page disclose that the Pine plant at Okmulgee, Oklahoma, was at the time the testimony was given, being reconditioned for operations and that this was also true of the Schram plant at Hillsboro, Illinois. The above mentioned testimony was given in May of 1941. In January of 1942 F. G. Littler, an employee of Ball Brothers, testified that Ball Brothers' plants at Muncie, Indiana, Okmulgee, Oklahoma, and Wichita Falls, Texas, were then in operation (R. 6559 IX). The Okmulgee plant of Ball Brothers was purchased from the Pine Company (R. 3030 IV). Schedule A of the agreement of March 25, 1933 (Ex. 199) discloses that the license to use the Hartford feeders included five feeders located at the Hillsboro, Illinois plant (Schram plant), six feeders located at the Huntington, West Virginia plant (Schram plant) and five feeders located at the Okmulgee, Oklahoma plant (Pine plant).

All this disproves plaintiff's contention that the Schram Manufacturing Company and the Pine Glass Company were purchased in 1925 and 1929, respectively, for the purpose of closing down the plants of those companies. We, therefore, submit that the record discloses that the District Court overlooked or ignored pertinent and conclusive evidence in its finding and statement as to the Schram Manufacturing Company plants and in its statement as to the Pine Glass Company plant (Court's opinion 79).

The District Court's findings as to this (Findings 336 and 367, R. 7354-5 X) are merely to the effect that the factories that Ball Brothers acquired from Schram are not now being used by Ball Brothers to manufacture glassware and have not been used for some time. Finding 367 refers to the purchase of the Pine Company plant but there is no reference in any finding to the closing down of the Pine plant. The District Court's opinion, however, states that the Schram factories have never been operated by Ball Brothers and that the Pine plant has been closed down since its purchase by that company (Pages 78 and 79 of the Court's opinion) although there is nothing in the record which forms a basis for such a conclusion and the statement is in direct conflict with the only testimony in the record bearing on the point. In addition, the statement is, as noted, at variance with the presumably well considered findings of fact and ignores the fact that the plaintiff failed to sustain its burden as to proof that the Schram and Pine plants were purchased and closed down.

The Allegation That Ball Brothers and the Ball Defendants Joined the Conspiracy by Entering Into the Agreement of March 25, 1933.

There is nothing in the record which indicates that Ball Brothers or any of the Ball defendants had any knowledge of the activities which the complaint charges constituted a conspiracy in restraint of trade in connection with patents, glass-making machinery and glass containers. As a matter of fact, testimony adduced by the Government discloses that circumstances of the alleged conspiracy were not known to F. C. Ball, President of Ball Brothers, and G. A. Ball, Vice President of Ball Brothers, until the hearings before the T. N. E. C.

in December of 1938 (R. 3050 IV; 4279 VI; Ex. 1228, R. 3068 IV, 13816 XXI). That is to say, there is nothing in the record which imputes knowledge to Ball Brothers that a conspiracy in restraint of trade had been formulated and was in existence at the time Ball Brothers entered into the agreement of March 25, 1933. With this as a premise, we note our reliance upon the rule stated in *United States v. Falcone et al.*, 311 U. S. 205, 210; 61 S. Ct. 204, 207 (1940), that *those having no knowledge of the conspiracy are not conspirators.* We, therefore, submit that the character of the agreement of March 25, 1933 must be taken into account if the entering into it constituted the overt act which made Ball Brothers and the Ball defendants parties to an existing and active conspiracy on that date.

License Agreement of March 25, 1933.

There is nothing in this agreement which put Ball Brothers on notice that the terms and conditions thereof were part and parcel of any conspiracy in restraint of trade, or of a conspiracy such as is alleged by the complaint.

It is true that the agreement was in the nature of an exclusive license as to the use of Hartford's patented feeder inventions in the manufacture of fruit jars, but even exclusive licenses in a particular field have long been recognized as valid licenses. *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U. S. 459, 461, 462, 468, 469; 46 S. Ct. 166, 167, 169 (1926); *General Talking Pictures Corp. v. Western Electric Co.*, 305 U. S. 124, 126, 127; 59 S. Ct. 116, 117 (1938). It is true that the so-called non-exclusive portion of the Ball Brothers license to use the Hartford feeder inventions was a limited and restricted license in that it excluded Ball Brothers from using the licensed inventions in the

manufacture of certain wares. This, however, was neither unusual nor unlawful, since as stated by this court in *Ethyl Gasoline Corp. v. United States,* 309 U. S. 436, 456; 60 S. Ct. 618, 625 (1940):

> "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using or selling his invention. R.S. 4884, 35 U.S.C. 40. The extent of that right is limited by the definition of his invention, as its boundaries are marked by the specifications and claims of the patent. *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U. S. 502, 510. He may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give."

As has been noted, the agreement also gave Hartford the refusal of feeder patents owned by Ball Brothers in case Ball Brothers contemplated selling the same or granting licenses thereunder. There, however, was nothing in the agreement which compelled Ball Brothers to license Hartford under its patents or to sell any of its inventions or patents to that company and there is nothing in the record which even suggests that Hartford ever acquired any rights under any of Ball Brothers' patents.

The record is also silent as to the character of these patents. As a matter of fact, the rulings of the District Court disclose its refusal to consider patents from the standpoint of *priority, validty, infringement* or *domination* (R. 5040 VII, 4504, 4600 VI and 4997 VII). We note this as a basis for our contention that plaintiff

failed to prove that Ball Brothers' feeder patents are of any significance in the glass industry or that they cover anything more than minor details of construction. Plaintiff has certainly failed to prove that Ball Brothers' feeder patents are not dominated by Hartford's feeder patents in such a way as to render them, and the structures or procedures covered by them, ineffective so long as Hartford feeder patents stand as unexpired, valid patents.

We also note our conviction that under the patent statutes of this country—as those statutes have been interpreted by this and other Federal Courts—Ball Brothers had the legal right to ask for and to accept an exclusive license as to the production of fruit jars under the Hartford feeder patents. If we are correct in this, then the form of the license sought and acquired by Ball Brothers cannot, in and of itself, involve Ball Brothers in, or connect it with any existing conspiracy concerning patents or patented machines or procedures.

On the other hand, it seems apparent that in demanding and accepting what has been referred to as Hartford's *residual rights as to fruit jars,* Ball Brothers was merely exercising its judgment that it would obtain a commercial advantage by acquiring such a license under the particular patents involved. This, we submit, is the basis for the acceptance of every license, exclusive or non-exclusive, under United States patents and, in the absence of knowledge of an existing conspiracy in connection with the patents forming the basis of such a license, the mere acceptance of a license cannot involve the licensee as a party to an unlawful conspiracy. *Virtue v. Creamery Package Co.,* 227 U. S. 8, 32-37; 33 S. Ct. 202, 206-208.

The Surrender by General Glass Company of Its License Under the Hartford Feeder Patents.

We know of no law which prevents a licensee from surrendering its license or a portion of its license to its licensor. We, therefore, note that under ordinary, normal circumstances, the General Glass Company would have had the unlimited right to reassign to Hartford its unused fruit jar rights under the Hartford feeder patents. If this statement is correct, then it follows that the surrender to Hartford of General's fruit jar rights cannot be considered as in any way involving Ball Brothers in an illegal deal or in a conspiracy in restraint of trade. As previously noted, the record clearly discloses that the General Glass Company was not manufacturing fruit jars and did not contemplate the manufacture of fruit jars. The record also fails to impute to Ball Brothers any knowledge of a conspiracy involving Hartford or the General Glass Company. Consequently, we submit that General's surrender of its right to use the Hartford feeder inventions in the manufacture of fruit jars (a) did not change the trade situation as to that commodity of commerce and (b) did not involve Ball Brothers in a conspiracy, such as charged by the complaint, even though Ball Brothers' desire for the best license Hartford could grant had the indirect effect of placing Ball Brothers in the position of initiating the surrender.

The Knox Glass Bottle Company, the Brockway Glass Company and the Gayner Glass Works Transactions Did Not Contribute to an Unlawful Conspiracy.

In discussing the purchase by Ball Brothers of the fruit jar business of the Knox Glass Bottle Company and its associated companies and also of the Brockway Glass Company, we are considering these transactions as unrelated, as carried forward by Ball Brothers for its individual purposes and as independent of any conspiracy. That is to say, we are considering each of these transactions as a separate transaction and we are also bearing in mind that the record fails to disclose that Ball Brothers or any of the Ball defendants were informed as to the activities which the complaint charges constitute a conspiracy initiated in 1916 and actively in force on March 25, 1933. We are also considering the fact that the above mentioned transactions, whether considered singly or collectively, did not result in an unreasonable restraint of trade. *Standard Oil of New Jersey v. United States,* 221 U. S. 1, 63, 78; 31 S. Ct. 502, 518; *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 360; 53 S. Ct. 471, 474.

The evidence as to the Knox transaction is somewhat confused but, from the standpoint of the issues in this cause, it does not go beyond the statements contained in paragraph 151 of the answer (R. 303 I). The record discloses that the purchase was made in March of 1933 (R. 1537 III). The evidence also discloses that the fruit jar business of the Knox companies in 1933 was not and could not have been an important business. Roy Underwood, President of the Knox Glass Bottle Company and its associated companies (R. 1508 II), testified as to the transactions leading up to the Knox companies' license to use the Hartford feeder inven-

tions in the manufacture of containers. This testimony discloses that the Hartford license to the Knox companies excluded the use of its inventions in the manufacture of fruit jars (R. 1531); that prior to accepting the license, the Knox companies had manufactured a few fruit jars (R. 1522 II) and that in making the same it employed what was then known as the Miller feeder, i.e., the feeder licensed by the agreement (Ex. 151, R. 8827 XII) entered into between Hartford and the Knox companies (R. 1522, 1528 II) on August 25, 1932.

Underwood's testimony is also to the effect that after entering into this license agreement, his companies continued to manufacture fruit jars on the so-called Knox-O'Neill machine (R. 1534 II) but that the Knox-O'Neill machine was a disappointment both from the operative and also from the financial standpoint and that its failure to operate more successfully was due to the fact that Frank O'Neill (its inventor and producer) did not give it proper engineering service nor bring it to the point of development that might have been reached (R. 1557 III).

Thus the record discloses that in August of 1932 the Knox companies accepted a license under the Hartford feeder patents; that this license did not extend the use of the Hartford inventions to the manufacture of fruit jars; that even before August of 1932 the Knox companies only manufactured a few fruit jars; and that the Knox Glass companies turned to the Knox-O'Neill machines after the August, 1932 agreement but these machines were not wholly successful, because they were not fully developed. For these reasons it is apparent that the fruit jar business of the Knox Glass Bottle Company and its associated companies could not have been of very great importance in March of 1933. In any

event, the record fails to disclose or even indicate that it was an important item of interstate commerce.

The Brockway Company situation is similar to that of the Knox companies. Ball Brothers purchased its fruit jar business April 27, 1933 (Ex. 200, R. 8901 XII). This business was not large enough to be an important item in the trade of this country. For the sake of brevity, we merely note that the Brockway Company accepted a license under the Hartford feeder patents on January 23, 1933; that the licenses did not extend the use of the Hartford inventions to the manufacture of fruit jars (Finding 374, R. 7356, Ex. 161, Schedule C, R. 8854, 8866 XII); and that Ball Brothers paid Brockway almost twice as much for its inventory of fruit jars as it did for its agreement to stay out of the fruit jar business for fifteen years (Finding 379, R. 7357). As a matter of fact, Ball Brothers paid $54,000 for this agreement, two trade marks, two United States patents, and the molds employed by Brockway in the manufacture of fruit jars, but paid $94,000 for the fruit jars Brockway had on hand at the date of the agreement, to-wit: April 27, 1933 (Finding 379).

There is nothing in the record which in any way connects this Brockway transaction with Hartford or any other defendant in this cause. There is certainly nothing in the record which connects the Brockway transaction with an organized conspiracy such as is alleged by the complaint, and there is nothing in the record which indicates or suggests that Brockway's fruit jar business was an important item in the industry at any time or in April of 1933.

It is also our contention that the Knox transaction was an independent transaction, insofar as Ball Brothers is concerned. This conclusion and contention is predi-

cated on the fact that Ball Brothers had no interest in and was not at all concerned with the business relationship between Hartford and the Knox companies. It is true that Underwood's testimony is to the effect that he made a proposition to Ball Brothers at a New York conference; that his proposition not only involved a payment by Ball Brothers but also a release of some indebtedness by Hartford; and that F. Goodwin Smith, President of Hartford, was present at the time Ball Brothers agreed to purchase the fruit jar business of the Knox companies (R. 1537 III).

This testimony, however, is not in strict accordance with Exhibits 192, 193 and 194 (R. 996 II, R. 12718A-12721 XIX), but in any event the record clearly discloses that the proposition as to the payment of $100,000 by Ball Brothers and as to the release of a portion of a prior indebtedness by Hartford came from Underwood and came from Underwood after a New York conference. Exhibits 192, 193 and 194 also disclose that Underwood's proposition was in fact divided into two parts, even though the letter to Ball Brothers (Ex. 193) was employed for a double purpose. One part of the proposition was directed to Ball Brothers and the other part was directed to Hartford. Exhibit 194 also discloses that Hartford acted independently of Ball Brothers in connection with Underwood's demand as to the release. We also note that there is nothing in the record which indicates that Ball Brothers had anything to do with Hartford's acquiescence in Underwood's demand or which indicates that Hartford had anything to do with Ball Brothers' payment of $100,000 to Underwood or to the Knox companies.

The Gayner Transaction.

The Gayner transaction is largely a matter of memory. There is a question as to whether or not Ball Brothers purchased Gayner's right to employ Hartford's inventions in the manufacture of fruit jars or purchased Gayner's entire fruit jar business for the period from May 11, 1933 until July 1, 1934. The probability is that the purchase involved the fruit jar business but in any event, the transaction excluded Gayner Glass Works from the business of manufacturing fruit jars for a little more than a year and those having knowledge of the transaction recall that the fruit jar business of the Gayner Glass Works was so limited as to be almost insignificant. In connection with this Gayner situation we note that the complaint does not charge that Ball Brothers purchase contributed to or formed a part of any conspiracy.

All these transactions (Knox, Brockway and Gayner) were independent and unrelated. They occurred approximately ten years ago. It is reasonable to assume that the recollection of the witnesses as to all the details involved is, at best, vague and, we submit, it is unjust to raise inferences against these appellants, on such testimony. We also submit that the Knox, the Brockway and the Gayner transactions merely indicate Ball Brothers' desire to improve its own situation in the fruit jar field and are not such as to involve Ball Brothers or any of the Ball defendants in a conspiracy such as is alleged by the complaint. *United States v. Falcone et al supra.*

Reed Glass Company Suit.

The Government's allegation in connection with the Reed Glass Company seems to center around the letter of May 6, 1935 written by F. C. Ball to F. Goodwin Smith (Ex. 220, R. 1021 II, 12744 XIX) and also a letter of May 15, 1935 written by F. C. Ball to R. D. Brown (Ex. 1195, R. 3055 IV, 13802 XIX). A consideration of these two exhibits will disclose that they do not provide a basis for criticism in the present case. Before discussing the exhibits, we refer to the circumstances under which they were written.

The Reed Glass Company had been sued by Hartford. The suit was based on the charge that the Reed Company was infringing Hartford's feeder patents but the suit lay dormant. Under the belief or with the knowledge that the Reed Company was manufacturing and selling fruit jars "at cut prices", F. C. Ball protested about the Reed Company's unchecked activity in connection with the use of Hartford's inventions in the manufacture of fruit jars.

The first of these letters was written on May 6, 1935 and indicates that A. M. Pease, an employee of Hartford, had suggested cooperation between Ball Brothers and Hartford in the then pending suit against the Reed Company. In connection with the Pease suggestion, F. C. Ball indicated his willingness to cooperate in obtaining an early setting for the trial of the case. As to the further cooperation suggested by Pease, F. C. Ball stated that if any of Ball Brothers' patents bear on the Reed feeder or its operation *"we will consider such further cooperation with you as may be recommended"*. The letter of May 15, 1935 (Ex. 1195) is hardly more than a follow-up letter.

We submit and contend that Ball Brothers had a perfect right to urge an early setting for trial of the Reed suit and even to offer its cooperation in an effort to obtain such a setting. In this connection we refer to *Western Electric Co. v. Pacent Producer Corp.* 42 F. 2d 116, 118 (C. C. A. 2, 1930) where the license under consideration was similar to Ball Brothers' license in connection with the use of the Hartford feeders in the manufacture of fruit jars. In that case the court said:

> "A patent licensee having such a contract is obviously prejudiced by an infringement of the patent, for the patentee's sufferance of an unauthorized practice of an invention is as harmful to his promisee as would be the grant of a license in direct violation of the contract. To make effective such a contract, the licensee must have the right to compel the patentee to assert his monopoly for the benefit of his licensee;"

In view of the above, we suggest that a licensee also has a right to protest to his licensor as to the unlicensed use of the invention constituting the subject matter of his license. We also suggest that there is nothing illegal in a reference to the fact that the unlicensed user of the invention is cutting prices, in connection with the product produced by the infringement, and is, therefore, disturbing market conditions. Merchants and manufacturers are necessarily concerned with prices and market conditions and we submit that a reference to either by such an individual is not unusual or out of the ordinary. It certainly cannot be employed as disclosing some ulterior motive or as indicating a combination in restraint of trade.

As to this Reed situation, it might be noted that Ball Brothers did not cooperate with Hartford in any way (R. 4280 VI) and as a matter of fact, the record discloses that the Reed suit has not as yet been tried.

Mallinger and Other Letters of Protest.

Plaintiff stresses the fact that Ball Brothers wrote a number of letters to Hartford protesting because of the unlicensed use of Hartford feeder inventions in the manufacture of fruit jars. We have already noted that some such letters refer to prices, price cutting or market conditions. We also note that all these letters were either written during the N.R.A. or shortly after the N.R.A. was declared unconstitutional by this court in its decision in the case of *U. S. v. Schechter Poultry Corp.* 55 S. Ct. 837; 295 U. S. 495 (1935). That is to say, the large majority, if not all of these letters were written during the period the Code Authority was controlling industry and attempting to prevent overproduction, price cutting and the organization of new business interests. We do not urge this as an excuse for the letters because they were protesting to Hartford about an infringement of Ball Brothers' fruit jar rights, but we do note that they were written at a time when price cutting was generally considered to be unlawful, or at least detrimental to public welfare.

Price Leadership.

Paragraph 180 of the complaint (R. 52) charges a system of price leadership established, agreed upon, maintained and enforced by concerted action of the defendants in this cause. The record wholly fails to uphold this charge.

Price leadership is the result of economic or trade conditions in this country. Insofar as Ball Brothers is concerned, it merely means the recognition of the experience of some manufacturer in the industry and the following of his prices. Price leadership, however, does

not mean, nor does it in any way involve an agreement or an understanding as to prices (R. 6545 IX).

Ball Brothers admittedly recognizes Hazel-Atlas as the price leader in connection with wide mouth packer's ware and Owens in connection with certain types of narrow mouth ware, and follows their leadership. The reason for this is that Ball Brothers desires to obtain the best prices possible for its products and knows that it cannot get better prices than those of the leader in the industry (R. 6549 IX).

This matter of price leadership was brought out by the testimony of E. Arthur Ball and is, of course, predicated on his knowledge of the situation (R. 6548). He is absolutely positive in his statement that as to Ball Brothers there is no agreement or understanding, oral or otherwise, as to price leadership or as to prices (R. 6545). G. A. Ball confirms this by his statement as to prices (R. 3076 IV):

> "Our policy always has been an independent one. We make our prices and they are not governed by anyone else's prices other than as competition governs them * * *. We have no agreement with anyone regarding prices on ware, packer's ware or jars."

See also the testimony of Petty (R. 6645 IX).

Prices are an important part of commerce. They must be quoted in order that commodities may move from producer to consumer. The publication of price lists is an old and universal procedure. It expedites sales transactions. Such publications and the knowledge derived therefrom is the basis of price leadership, as that term is defined by the witness E. Arthur Ball (R. 6545 IX) and cannot be condemned as restraining com-

merce or as occasioning an unreasonable or unlawful restraint of trade. *Maple Flooring Mfg. Assn. v. U. S.* 268 U. S. 563, 582; 45 S. Ct. 578, 584.

There Was No Agreement or Understanding to Limit the Fruit Jar Production of Owens or Hazel-Atlas.

The Government's contention as to an oral or secret agreement limiting the production of fruit jars by Hazel-Atlas to 300,000 gross per year and by Owens to 100,000 gross per year is largely predicated on an interpretation by plaintiff's counsel of testimony given by F. C. Ball before the Temporary National Economic Committee in December of 1938. These appellants contend that the testimony in question would not substantiate the Government's contention even if it were in this case and, while we opposed the Government's effort to introduce excerpts from this testimony, the record discloses that we were willing to stipulate the entire testimony given by F. C. Ball before the T.N.E.C. In this connection see the colloquy concerning exhibit 1329 on page 3342, volume V, of the record.

In connection with the colloquy just referred to, it should also be noted that a later ruling by the District Court in connection with this matter was as follows (R. 3968 VI):

> "The Clerk calls my attention to Exhibit No. 1179: Excerpts of Testimony of Frank C. Ball before the T.N.E.C.; being certain admissions made by him and upon which decision was reserved. The Court during the vacation period decided the issue on the admission of the testimony of F. C. Ball before the T.N.E.C. and refused admission of that testimony; so that Exhibit No. 1179 is refused."

It should also be stated that counsel on behalf of Ball Brothers urged the exclusion of exhibit 1179 but primarily because it involved excerpts from the testimony of F. C. Ball and that, in any event, the testimony when given was not binding on Ball Brothers or any of the Ball defendants except F. C. Ball. Due to the illness and age of F. C. Ball (R. 4271, 4280 VI), his deposition was taken in Muncie, Indiana and was later read into the record (R. 4261 VI). As to this matter of limitation on the production of fruit jars, he testified as follows (R. 4268):

"Q. You testified at the conference you were present in which Mr. Hornbrook, Mr. Brady, Mr. F. Goodwin Smith and Mr. Brown and Mr. Belknap were there, something was said about Hazel-Atlas producing three hundred thousand gross and Owens producing one hundred thousand gross?

A. Yes, sir.

* * * * * *

Q. What happened after that, state that. Did you forget about the subject matter, or did that subject matter ever come up again?

A. That question was talked over later, yes.

Q. How much later after the first meeting?

A. At the same conference it was talked about.

Q. Who said anything about it, and what did you say?

A. It was proposed to restrict the quantity the Hazel-Atlas Glass Company and the Owens people were to make and Mr. Hornbrook said that that could not be agreed to because it was in violation of the law and for that reason we dropped the question."

G. A. Ball testified about this situation as follows (R. 3044 IV):

"Q. You go ahead and tell us what happened at this meeting?

A. Well, Mr. Smith was arguing about the making of a license arrangement, and we had been talking of the arrangement; what the arrangement would be for a license. Mr. ——— I don't recall then whether the General Glass matter was mentioned or not—there were suggestions made that the Levis and McNash concern would probably make so many jars.

Q. Limit their production?

A. Well, there was conversation of that kind.

Q. Who said that? When you say the suggestion was made?

A. I don't know who said this or that. I don't recall; general talk across the table, you might say.

Q. Go ahead.

A. Finally, Mr. Hornbrook said that there could be no arrangement or agreement for a restriction of production. Mr. Brady agreed with that.

Q. Why did they say—those two gentlemen who are not alive—why did they say there could be no arrangement for restriction?

A. It could not be done legally.

Q. Did they say why it could not be done legally?

A. Why, because the law would not allow it.

Q. Did they say what law?

A. I don't think they mentioned what particular law, no.

* * * * * *

Q. Did they say it would violate the federal anti-trust law?

A. Well, I don't know, that they said it in that way. They said it would not be legal and that was enough for us."

F. Goodwin Smith's testimony as to this fully confirms that of F. C. and G. A. Ball (R. 771). W. E. Levis also flatly denies that there was an agreement to limit fruit jar production (R. 2154 III). McNash also confirms F. C. Ball's and G. A. Ball's statements concerning this situation (R. 2426; 2434-9 IV); see also testimony of McNash (R. 2441-2).

R. D. Brown's testimony as to this extends through several pages of the record (R. 4046-4055 VI). We call particular attention to it and to the portions thereof which bear on Exhibits 5316, 5317 and 5318 (R. 15005-12 XXV). His testimony on page 4052-3 of the record, relates to the conference at which Hornbrook expressed the opinion that the limitations of production would be unlawful, and confirms the testimony of F. C. Ball and G. A. Ball heretofore quoted. In the light of the record we submit and strongly urge that the District Court erred in its conclusions and findings as to the alleged agreement limiting fruit jar production.

The District Court's opinion (pages 82-83 of the opinion) and finding 383 (R. 7358 X) disclose that the court found that an agreement or understanding to restrict fruit jar production, on the part of Owens and Hazel-Atlas, had actually been entered into. It is our contention that in arriving at this conclusion the District Court ignored or overlooked two important facts. First, that the witnesses who testified to this point brought out the fact that Ball Brothers was desirous of having Hartford limit the number of fruit jars produced by Owens and Hazel-Atlas on Hartford feeders to the annual production above stated but that this request or demand on the part of Ball Brothers was withdrawn and no agreement or understanding as to fruit jar limitations was entered into or has ever existed. Second, such documentary evidence as bears *directly* on this

entire situation substantiates the testimony of these witnesses. That is to say, the draft agreements (Exs. 5316, 5317, 5318 and 5319) with the markings and notations thereon introduced in connection with the testimony of R. D. Brown, fully confirm not only his testimony but also the testimony of the five other witnesses who testified as to this. On the other hand, the documentary evidence (Exs. 189 and 191, R. 12713, 17 XIX) relied upon by the District Court in its opinion merely confirms the admitted fact that limitations as to fruit jar production were considered and discussed.

In this connection we also note that the testimony relied upon by the District Court as the basis for its finding of fact No. 383 does not in fact bear on the point in issue. It rather bears on what transpired before the T.N.E.C. and to a large extent the witnesses' conception of the meaning of an isolated statement by F. C. Ball made while testifying before the above mentioned committee. For these reasons we urge and contend that the record in this case discloses that the District Court erred in its holding and finding as to this matter of a secret or oral agreement. We do not discuss the legality or illegality of this alleged secret agreement because of our conviction that no such agreement was ever in existence. We, however, stress the points here raised because the District Court's holding and finding is to the effect that the six witnesses above mentioned have intentionally misstated the facts. In concluding our discussion of this situation, we again assert our conviction that the documentary evidence bearing directly on the point here in issue, fully confirms the testimony of the six witnesses F. Goodwin Smith, F. C. Ball, G. A. Ball, W. E. Levis, Harrison F. McNash and R. D. Brown.

Conclusion as to Point I.

In the foregoing discussion, we have attempted to touch upon all activities and transactions strongly urged

by the plaintiff as bearing on Ball Brothers and the Ball defendants. We have not, of course, discussed all the exhibits relied upon by the Government in connection with Ball Brothers' activities or even a majority of those exhibits. For the sake of brevity, we have also omitted reference to some minor points urged by the Government. We, however, again submit that the mere act of entering into the agreement of March 25, 1933 (Ex. 199) was not sufficient to connect Ball Brothers with any conspiracy and certainly not a conspiracy such as is here claimed by the plaintiff, viz., one initiated in 1916 and in existence and fully effective in March of 1933. With this as a premise, we also submit that the Knox, the Brockway and the Gayner transactions were not such as to contribute to an unreasonable or unlawful restraint of trade and even though all those transactions are considered together and in connection with the Ball Brothers' act of entering into the agreement of March 25, 1933.

For the purpose of disclosing the correctness of our position as to this, we refer to exhibit 947 (R. 2444 IV 13593 XXI) which sets forth the annual shipments of fruit jars in such a way as to disclose Ball Brothers' fruit jar shipments for successive years beginning with the year 1928 and extending through 1939. The figures set forth by this exhibit disclose that in 1932—i.e., the year before Ball Brothers entered into the agreement of March 25, 1933, and likewise the year before the Knox, the Brockway and the Gayner transactions—Ball Brothers produced 55.7% of the fruit jars shipped in this country. During the year 1933—i.e., the critical year from the standpoint of Ball Brothers' activities here complained of—Ball Brothers' shipments of fruit jars fell off approximately 1%, i.e., to 54.4%. Exhibit 947 also discloses a normal shifting of fruit jar production (shipments) from one manufacturer to the other

throughout the years 1928-1939 inclusive, and the fact that for the twelve year period involved, Ball Brothers' shipments of fruit jars fluctuated from between about 57% and about 53% with an average of around 55%.

Exhibit 1576 (R. 8043 XI) is a stipulation setting forth data as to Ball Brothers prices on fruit jars covering the years from 1919 to 1939 inclusive. The opening prices set forth by the exhibit for each of the years involved disclose a downward trend of fruit jar prices throughout the period of Ball Brothers' license under the Hartford feeder patents. The exhibit also discloses that the prices of fruit jars in 1939, the last price set forth by the exhibit, was less than the price in 1933. It also discloses that the average price per gross for quart Mason fruit jars (in carload lots) for the period of the license—i.e., 1933 to 1939 inclusive—is $6.76. The average price of fruit jars for this seven-year period is also less than that for any preceding seven-year period. In substantiation of this statement, we note that the average price of quart jars for the years 1926 to 1932 inclusive, is $7.47. In connection with this figure we also note that the price of quart fruit jars in 1939 was $6.56. This last mentioned figure takes into account the discount for sales in carload lots. In connection with this statement we note that the prices set forth by the exhibit in connection with the years 1919 to 1932 all involve prices of fruit jars sold in carload lots.

Our reference to these two exhibits (Exs. 947 and 1576) completes our discussion of the contention that Ball Brothers' activities during the year 1933 were not such as to occasion an unreasonable restraint of trade. These exhibits disclose that Ball Brothers' fruit jar business was not benefited by its 1933 activities. That is to say, the acquisition of the license to employ the

Hartford feeder inventions in the manufacture of fruit jars did not improve Ball Brothers' position—percentagewise—in the fruit jar industry nor did it occasion an upward trend in prices. This statement involves the Knox, Brockway transactions. It also applies to Hartford's transaction in reacquiring the General Glass Company's fruit jar license. We also again stress the fact that the price declined throughout the period including 1933 and 1939, i.e., throughout the period of the license under the Hartford patents.

In connection with this entire situation, we are relying upon the rule followed by this court in *Appalachian Coals Inc. v. United States,* 288 U. S., 344, 360-61; 53 S. Ct. 471, 474 (1933). We quote:

> "The decisions establish, said this court in *Nash v. United States,* 229 U. S. 373, 376, 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade' * * *.
>
> "In applying this test a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' Board of Trade v. United States * * *. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions."

Point II.

The District Court Erred in Failing to Hold That All Material Issues Herein as to These Appellants Were Rendered Moot by the Settlement Agreement of August 1, 1940 and by Releases of October 16, 1940 to Knox Glass Bottle Company and Associated Companies and to Brockway Glass Company.

We contend and submit that, as to these appellants, the principal issues pressed by the plaintiff are now moot. In making this statement, we refer again to the settlement agreement of August 1, 1940 between Ball Brothers and Hartford (Ex. 5026) and to the releases of October 16, 1940 (Exs. 5035 and 6039), which absolved the Knox Companies and the Brockway Company from all obligations to Ball Brothers as to the manufacture, sale and distribution of fruit jars.

As previously noted, the settlement agreement revised the agreement of March 25, 1933 (Ex. 199) and eliminated therefrom all the terms and conditions condemned or criticized by the plaintiff. As also previously noted, the above mentioned releases placed each of the Knox companies and the Brockway Company in the position of immediately engaging in the business of manufacturing and selling fruit jars, as that term has been employed throughout the present discussion. The record also discloses that upon the release of the so-called residual rights as to fruit jars, Hartford extended the right to use the Hartford feeder inventions in the manufacture of fruit jars to the Knox Glass Bottle Company, its associated companies, the Brockway Glass Company and all the rest of Hartford's forty to fifty licensees under its feeder patents (R. 1472-5 II and Ex. 5025, R. 14731 XXIV). Thus it is apparent that whatever may have been the commercial effect of Ball

Brothers' acquisition of the so-called residual rights and of the fruit jar businesses of the Knox Companies and the Brockway Company, this effect has been fully dissipated. This statement also applies to the transaction involving Ball Brothers and the Gayner Glass Works which was completed and terminated prior to July 1, 1934.

The settlement agreement of August 1, 1940, the releases of October 16, 1940 and Hartford's extension of the rights of each of its licensees to employ its feeder inventions in the manufacture of fruit jars have been characterized as an "eleventh hour repentance". We do not agree with the implication of this characterization except insofar as it may indicate that these appellants attempted to readjust conditions so as to avoid a continuation of those things objected to and condemned by the plaintiff in the present case. In any event, we rely upon this court's holding in *Standard Oil Co. (Indiana) v. United States*, 283 U. S. 163, 181-182, where an eleventh hour withdrawal from previously asserted rights was under consideration.

Even though we may be wrong in our belief that Ball Brothers' acquisition of Hartford's residual rights as to fruit jars and the fruit jar businesses of the companies above mentioned, did not constitute a violation of Sections 1 and 2 of the Sherman Act, nevertheless, the relief sought in the present case is an injunction and relates only to the future. Therefore, the propriety or impropriety of the 1933 transactions are no longer of any importance in this case. The issues as to those transactions have become moot and, relying upon this court's opinion in the above mentioned Standard Oil case, we urge and contend that the District Court erred in not taking that situation into consideration.

Point III.

Ball Brothers' Position in the Glass Industry Was Not Occasioned by Unlawful Practices.

Ball Brothers has been in the glass industry since the early 80's and has manufactured fruit jars for more than fifty years. Its position in the fruit jar field is possibly due in part to this and also in part to the fact that it is the one company in the industry that manufactures the jars, the caps and the rubber rings (R. 6593 IX). The testimony of E. Arthur Ball, Vice President of Ball Brothers in charge of fruit jar sales (R. 6537-9 IX), indicates that Ball Brothers' position in the fruit jar field is also due to the care exercised by it in connection with each of the many details involved by the manufacture and sale of fruit jars.

The fruit jar is a special item from the standpoint of production, distribution, sale and use. It is a difficult article to sell because it is used by one class of buyers but is sold by the manufacturer to another class of buyers. It is sold to wholesale grocers and jobbers and by them to grocers and retailers. The housewife is the ultimate purchaser and the user of fruit jars and it is she that the manufacturer must interest in his product. The housewife does not purchase jars until she needs them. It is, therefore, necessary for the jars to be available to her at the time she desires to purchase them (R. 6538).

The demand for fruit jars is variable. It is almost impossible to predict the extent of the demand, sufficiently in advance of the shipping season, to provide for it. This is due in part to the fact that the demand varies with weather conditions, and with the conditions of the crops in different parts of the country. A winter

freeze or a spring freeze will kill the fruit. A drought during the summer or a particularly wet summer may spoil the vegetable crop and, therefore, diminish the demand for and the sale of fruit jars. For this reason the fruit jar is a special item because it is sold to a special trade and the demand for it by that trade is to some extent controlled by weather conditions and is, consequently, unpredictable (R. 6538).

Ball Brothers takes this condition into consideration in its production and marketing of fruit jars. In order to give every housewife the opportunity of buying Ball Brothers' jars at the moment she wants them (R. 6543), Ball Brothers produces and distributes fruit jars under conditions such as to have them on sale by retailers in every locality within the United States where foodstuffs, suitable for canning, are grown. In order to fully supply the demand when it occurs, Ball Brothers must, therefore, prepare to meet the maximum demand (R. 6539). For this reason fruit jars must be placed in the hands of wholesalers, jobbers and retailers located throughout the entire United States, and must be so placed ahead of the demand for them.

Wholesalers and jobbers are reluctant to invest their money and tie up their warehouse space with ample quantities of fruit jars to take care of the maximum demand, because of the uncertainty of the demand. As an inducement to such business organizations to carry an ample supply of fruit jars, Ball Brothers sells fruit jars on consignment, i.e., it ships the jars to the wholesaler and the jobber but the jars remain the property of Ball Brothers until they are sold to the retailer (R. 6541-2).

Fruit jars are also a special item from the standpoint of production. Ball Brothers attempts to manu-

facture fruit jars so that they will in every conceivable case give satisfaction to the user. Fruit jars as manufactured by Ball Brothers are, therefore, strong, sturdy containers which can be used over and over year after year (R. 6540). As manufactured by Ball Brothers, the fruit jar is also a container which will give "a hermetic seal under any method of canning and when used in any part of the country" (R. 6540).

Fruit jars, when packed and shipped from Ball Brothers' factory, are equipped with one type of closure. The housewife, however, often purchases new closures to be used on hold-over jars, with the result that the jars must be so made that they will produce the necessary hermetic seal when used with any of three types of closures. As a result, fruit jars are manufactured by Ball Brothers with two sealing surfaces—one around the top edge of the jar and one on a shoulder which surrounds the top section of the jar but is located below the top edge (R. 6540). From the standpoint of manufacture these double sealing surfaces necessitate increased care. They also require separate and careful inspection because each jar sold must be provided with a perfect sealing surface, both at the top edge and on the upper face of the sealing shoulder, in order to insure successful home canning operations. For this reason, fruit jars are very carfeully inspected and this care extends also to the inspection of lids or closures and the rubber rings (R. 6541).

For the purpose of stimulating the sale of fruit jars, Ball Brothers employs radio, magazine and newspaper advertising and demonstrates at state, county and district fairs throughout the country. It has a department known as the Educational Department, headed by a graduate home economist. This department supplies demonstrators who travel around the country and

popularize Ball Brothers' fruit jars and equipment by demonstrating their use to classes, clubs and groups of women brought together through the F. S. A. and various home-demonstration agents throughout the country (R. 6539-40).

This nation-wide distribution and its corollary nation-wide demand is accomplished by jobber salesmen, salesmen who call upon the wholesale grocers, specialty salesmen and food brokers (R. 6541). The specialty salesmen contact retailers in the various localities, obtaining orders from them and those orders are turned over to wholesalers or jobbers in the campaign of selling fruit jars in carload lots. As an additional inducement in the effort to overcome the reluctance of wholesalers and jobbers to invest their money and employ the storage space in a seasonal item, the specialty salesmen hand the orders from retailers to wholesalers or jobbers with the hope that the wholesaler or jobber so favored will order fruit jars in carload lots. Fruit jars are shipped in straight carloads (R. 6541-2).

Fruit jars are also a special item when compared with packers' ware, both from the standpoint of sales and distribution. Packers' ware is sold direct to the food packer, i.e., the packer or user of the ware buys direct from the manufacturer. With fruit jars the wholesaler or the jobber is the customer and consequently Ball Brothers does not contact the user of the fruit jars in making its sales. The packer knows his requirements, both as to the number of jars and the conditions under which they are to be used. The wholesaler and jobber do not. The packer can anticipate his needs almost to the jar and can order accordingly. The wholesaler and jobber cannot do this because of the variations in the demand for fruit jars from season to season (R. 6543).

The packer knows the exact conditions under which the containers purchased by him will be used. He knows the conditions under which they will be washed, filled with food products, sealed, crated for shipment and shipped. He knows all this at the time of purchasing the ware from the manufacturer. Consequently all this detailed information is available to the manufacturer of packers' ware (R. 6542-3). On the other hand, there is practically no uniformity of procedure in the domestic canning of foods with the result that Ball Brothers must be and is careful, in the manufacture and inspection of fruit jars, to produce jars having a large factor of safety. This is necessary to insure a satisfactory and effective product in the hands of the housewife and must take into account her location geographically and also from the standpoint of altitude. It must also take into consideration the procedure she employs in canning and also that housewives are not always careful in their treatment of jars (R. 6543).

Packers' ware is a single use item. The fruit jar is a multiple use item. This fact involves the matter of "light weighting". In order to insure the successful use and reuse of the fruit jars by the housewife, the jars as manufactured by Ball Brothers contain more glass than jars of the same capacity manufactured for packers' use. By way of example, a quart size fruit jar contains at least 14 ounces of glass, whereas a packers' jar of the same capacity may contain as little as 10 or 11 ounces of glass (R. 6543-4). Thus it is apparent that Ball Brothers' fruit jars contain approximately 40% more glass than packers' ware of corresponding capacity.

Packers' ware is sold direct to the user and sold on regular terms of cash within a comparatively short time after delivery, whereas, as noted, fruit jars are sold

on consignment and are, therefore, paid for only after they are sold by the wholesaler or jobber (R. 6554). In some cases the manufacturer of fruit jars must wait more than a year after delivery before being paid for the jars (R. 6554).

The manner of selling fruit jars is different from that of other ware, including packers' ware. As noted, fruit jars are consigned. This in itself involves a tremendous investment by Ball Brothers in manufactured fruit jars, i. e., in inventory. The correctness of this statement is apparent when it is called to mind that Ball Brothers consigns jars to jobbers and wholesalers under conditions such that they will be available to meet maximum demands in every locality where foodstuffs suitable for canning are grown. G. E. Myers, Controller of Ball Brothers, discussed this point in connection with exhibits 6078, 6079 and 6080 (R. 6587-6590, 16241-42 XXVIII).

These exhibits have reference to fruit jar inventories for the years 1936, 1937 and 1938. The first column of each exhibit designates Ball Brothers' inventory (per gross of fruit jars) on hand in each month of the year. The second column discloses the number of gross of fruit jars consigned during each month. The third column, designated "Total", is the total of the first two, i.e., total inventory. The fourth column marked "Production" is the production of fruit jars by months during the year; the column marked "Shipments" sets forth monthly shipments of fruit jars; and the column marked "Billings" is the quantity billed out for fruit jars shipped, i.e., fruit jars consigned.

A reference to exhibit 6078, which bears on the number of gross of fruit jars consigned during the year 1936, discloses that the low point of the inventory was in January but amounted to 818,000 gross (sum of the

first two columns) and indicates an approximate investment of $3,200,000. This figure is obtained by multiplying the total by $4.00 (R. 6588). The high point of the inventory for this year was in July with 1,026,000 gross having an approximate value of $4,100,000. The average investment in fruit jar inventory for the year 1936 was $3,648,000 (R. 6588).

We comment on this detail of the fruit jar business for the purpose of showing that the consigning of fruit jars for sale throughout the various localities of the United States involves a tremendous investment in manufactured product (fruit jars) and that the necessity of carrying inventory such as disclosed by these exhibits really involves a matter of financing (R. 6590).

These exhibits 6078-79-80 also give an indication of the movement of fruit jars from inventory to the consumer, i.e., the turn-over referred to by the witness Myers (R. 6589). By using Ball Brothers' own figures it was shown that an average two-thirds turn-over of fruit jars compared unfavorably with that of other products manufactured by Ball Brothers, which ran from one and one-quarter up to six or seven turns. Ball Brothers also has one product (straw paper) which has turned over on an average of thirty-eight times in three years (R. 6590).

All this discloses that Ball Brothers' business of manufacturing, distributing and selling fruit jars is an unusual and highly special business and one which is different from the manufacture, distribution and sale of other types of glass containers, including packers' ware. It involves a number of details which in themselves seem simple, but which, when considered together and in connection with a nation-wide business, produce an intricate pattern involving many complica-

tions. We suggest and submit that Ball Brothers' extreme care as to each of these simple details contributes to, and is an extremely important reason for the position it occupies in the container industry, with relation to the manufacture, distribution and sale of fruit jars.

In making this statement we are not ignoring the fact that Ball Brothers has been in business since 1882 (R. 3027 IV); that during the life of the Owens suction machine patents, its exclusive license to use the inventions of those patents in the manufacture of fruit jars gave it some commercial advantage over its competitors; and that it is the only organization in the glass container industry that manufactures fruit jars and also the accessories which are sold with fruit jars, namely caps and rubber rings. We, however, submit and contend that Ball Brothers' care in the production and distribution of fruit jars, caps and rubber rings and its continuous effort to popularize its products with the housewives of the nation are the important, if not the principal reasons for Ball Brothers' present position in the container industry with relation to fruit jars.

Point IV.

Even Though It Be Considered That Ball Brothers and the Ball Defendants Have Each Violated the Law as Defined by Sections 1 and 2 of the Sherman Act, the Order of Injunction Is Unnecessarily Drastic as to Each of These Appellants in That It Extends Beyond the Charges as to Them, Is Confiscatory and Imposes Restrictions and Penalties Not Warranted by the Record and Contrary to Legal Principles Heretofore Announced by This Court.

In considering the final judgment and the injunction order thereof, we group the objections of these appellants as follows:

(a) The judgment directs Ball Brothers to offer for sale and to continue to offer for sale all the real estate, factories, tanks, furnaces and other assets pertaining to the manufacture of glassware now owned by the Ball Glass Corporation at Three Rivers, County of Live Oak, Texas, at a price to be determined by the District Court.

(b) The judgment prevents the free and unrestricted use by Ball Brothers and each of the Ball defendants of their property, including inventions and patents now and hereafter owned by each such defendant; and

(c) The judgment imposes a penalty on Ball Brothers, and one not contemplated by law, in that it directs it to forthwith pay to the Clerk of the District Court all monies received by it from the defendant Hartford pursuant to the settlement agreement of August 1, 1940. As an incident to this the final judgment also has the effect of cancelling the last mentioned

agreement and the agreement of March 25, 1933 as modified by that agreement.

The Purchase of the Three Rivers Glass Company.

The Three Rivers glass plant is located at Three Rivers, Live Oak County, Texas, and the business of that company was carried on at that location. The real estate, the plant and other assets of the company were purchased by G. A. Ball in November of 1936. The negotiations leading up to and which resulted in the acquisition of the Three Rivers plant were instituted by a receiver of the Three Rivers Company, one Henderson Coquat (R. 3057 IV). At the time of the purchase, the Three Rivers Company and the receiver were both in difficulties, i.e., the receiver was unable to operate the company successfully. The District Court, in dismissing the present complaint as to the Liberty Glass Company, found that the Three Rivers Company was a failing organization (Transcript 12491-4).

There is no dispute as to the following facts bearing on Three Rivers. Before the plant was purchased by G. A. Ball (or his representative), the Three Rivers Company was a licensee under Hartford's feeder patents. It was behind in royalty payments in an amount approximating $6000. Coquat attempted to sell the Three Rivers plant to Ball Brothers in 1934 (Ex. 1803, R. 14317 XXII) and the indication is that G. A. Ball conditionally agreed to take over the Three Rivers plant provided Coquat could get the bondholders to accept an amount which G. A. Ball stated he would pay for the bonds.

Hartford learned of G. A. Ball's interest in the Three Rivers plant and this knowledge apparently changed its attitude toward the Three Rivers situation. In this connection we note that the Three Rivers license

under the Hartford feeder patents had been cancelled but that Hartford entered into some arrangement with the receiver under which Coquat received a license, for the period of the receivership, to employ Hartford's inventions in the operation of manufacturing glassware at the Three Rivers plant.

The only controversy as to this situation involves the Government's suggestion or charge that the acquisition of the Three Rivers plant by G. A. Ball was for the purpose of closing it down and that Hartford assisted in this acquisition. There is nothing in the record which substantiates this suggestion or charge except that it appears that there may have been discussions with some Hartford representative relating to the amount of Hartford's claim against Three Rivers and whether or not it was willing to reduce that claim. In this connection G. A. Ball testified as follows (R. 3058-9):

"Q. And did you some time in 1936 ask Mr. Church to get the assistance of Hartford in purchasing the Three Rivers Plant?

A. I don't believe I put it to him in that way, sir.

Q. How did you put it?

A. My recollection is the Hartford-Empire Company was a creditor of the Three Rivers plant, and their claim, I believe, was the largest or one of the largest. Whether we would buy the plant or not depended upon the price at which it could be obtained, and I believe it was suggested that the Hartford-Empire might see fit to reduce their claim in some manner so that the cost of the plant, the price at which it might be sold, would be less, because at too high a price we would not be interested."

It appears that there was also some talk relating to the issuance by Hartford of a license to the Three Rivers Company before the purchase thereof by G. A. Ball.

The various exhibits relied upon by the Government indicate that Hartford was to some extent interested in a deal which would terminate the receivership and place the Three Rivers plant in the hands of Ball Brothers or some other operating company. So far as we know, there is nothing in the record which discloses or indicates any cooperation by Hartford in connection with the purchase of the plant, except as above suggested in connection with its claim against the plant. As to this we suggest that Hartford did nothing more than any other creditor of a bankrupt concern would do in an effort to have at least a part of its claim paid. The record discloses that Hartford received 40% of its claim (R. 5730 VIII).

Exhibit 1199 (R. 13804-B XXI), letter from F. C. Ball to A. T. Safford of January 28, 1935, is strongly relied upon by plaintiff. It, however, shows on its face that it involves Ball Brothers' *residual fruit jar rights* under Hartford's feeder patents. It has nothing whatever to do with the purchase of Three Rivers. It is along the line of our statement that Ball Brothers had protested to Hartford because of the manufacture of fruit jars by the Three Rivers Company—a licensee of Hartford.

The Government has raised the contention that the Three Rivers plant was purchased with the intent of closing it down. This is rebutted by the testimony of G. A. Ball which discloses that after the plant was purchased it was operated for about a year. It was then closed down for repairs and for reconditioning the furnace. The repairs were made at an expense of about $25,000 (R. 3077 IV). G. A. Ball testified (R. 3076 IV):

"A. That was the chief reason why we wanted it. It was located where we thought it would be advantageous for manufacturing and shipping to our customers. It was in the Southwest where at the time we thought there was going to be rather rapid growing trade, and that would give us an outlet and better advantage than some of the other plants."

Mr. Ball's testimony is also to the effect that, although the repairs were made, the Three Rivers plant was not used to manufacture ware after December of 1937 because of trade conditions (R. 3077 IV).

We submit and contend that this Three Rivers situation does not have the significance in this case which is urged by the Government. There is nothing in the record which forms a basis for the inference, expressed by the Government, that the plant was purchased for the purpose of being closed down. On the other hand, we urge that this Three Rivers transaction was a wholly independent transaction carried forward by Ball Brothers and as, in effect, stated by G. A. Ball, for the purpose of improving Ball Brothers' position in the manufacture and distribution of glassware in the territory around Three Rivers (R. 3076). We also submit that when viewed as an independent act by a company not a party to the conspiracy alleged by the complaint, it has no significance whatever in this case. We make this statement even though Hartford's interest in the transaction may cause this court to assume that Hartford assisted in Ball Brothers' acquisition of the plant in a way other than disclosed by the record.

For the purpose of argument we note that even if Ball Brothers and the Ball defendants are considered as parties to a conspiracy, such as alleged by the complaint, this will not change the character of the Three

Rivers transaction. There is nothing in the proofs which indicates or suggests that the purpose of the transaction was anything other than that stated by G. A. Ball. There is no evidence which provides a basis for an inference that Ball Brothers or any of the Ball defendants was desirous of, or even interested in benefiting Hartford financially or otherwise. It is, therefore, urged that an analysis of the evidence bearing on the Three Rivers transaction will bear out the contention that the transaction was one which only involved Ball Brothers and Coquat, the receiver of Three Rivers. Hartford may have been interested in a change in the Three Rivers situation. This, however, does not make it a party to the transaction and there is nothing in the entire Three Rivers situation which characterizes the purchase of the Three Rivers plant as a cooperative undertaking or as contributing to a conspiracy involving patents, glass-making machinery, glass containers or fruit jars.

In concluding the discussion as to this particular point we also note that neither the officers of the Three Rivers Company nor its receivers were able to make a commercial success of that company. It, as the District Court stated, was a failing organization. With this in mind, we contend and urge that the order of the District Court, in connection with the Three Rivers properties, is far too drastic and is not warranted by the circumstances involved. It is also submitted that the sale of the Three Rivers property at this time will neither benefit the public nor improve competitive conditions.

The Evidence in this Cause as to Ball Brothers and the Ball Defendants Does Not Support the Final Judgment as to Each of those Defendants.

Because of the death of F. C. Ball pending this appeal, we make but brief reference to him in this section of the brief. The findings of fact are to the effect that he and George A. Ball have been officers of Ball Brothers since 1882 and directors from at least prior to March 25, 1933; that they negotiated, among others, the March 25, 1933 agreement between Ball Brothers and Hartford; that as directors they ratified and confirmed the agreement of March 23, 1933 with the Knox companies and the agreement of April 27, 1933 between Ball Brothers and the Brockway Glass Company (Findings 612, 613, R. 7398 X).

The findings are to the effect that W. H. Ball and Edmund F. Ball have each been directors of Ball Brothers at least since March 25, 1933; that each ratified and confirmed the above mentioned agreements, viz: the agreements of March 25, March 23 and April 27, 1933; and that W. H. Ball signed the last mentioned agreement as Secretary of Ball Brothers (Finding 614, R. 7398).

The findings are also to the effect that Fred J. Petty has been a director of the Glass Container Association since 1936 and of Ball Brothers since September 21, 1935; that from January 7, 1930 until some time in 1940, he was Assistant Secretary of Ball Brothers; and that as Assistant Secretary, he attested the above mentioned March 25, 1933 agreement and the settlement agreement of August 1, 1940 between Ball Brothers and Hartford (Finding 615).

The above mentioned individuals constitute the Ball defendants and the findings to which we have just re-

ferred are the only findings of fact which are specifically directed to Ball defendants. This indicates, if it does not disclose, that the Ball defendants and certainly W. H. Ball, Edmund F. Ball and Fred J. Petty played very small and unimportant parts in the transactions referred to and condemned in the complaint. Even so, the major portion of the injunction, defined by the judgment, extends to each of these individual defendants. In this connection we refer particularly to paragraphs 21, 23 to 27 inclusive, 29, 36, 51 and 52. As we have pointed out, these paragraphs of the final judgment impose unreasonable restrictions on the individual defendants, with relation to property and business activities and, in some respects, are of such character as to have the effect of actually confiscating property or rights under property.

By way of example we note that there is not a *scintilla* of evidence that any one of these Ball defendants owns or ever has owned a patent or an invention relating to glass-making machinery. As a matter of fact, there is no evidence that any one of these Ball defendants owns any patent or any invention. It, therefore, follows that there are no proofs in this case which bear on a misuse of any patent owned by any Ball defendant, i.e., any individual defendant. Nevertheless, each of the Ball defendants is not only subjected to what we submit and contend are unreasonable restrictions in connection with existing patents and inventions relating to glass-making machinery, but they are also restricted in connection with other inventions, some of which are not yet in existence.

For the purpose of avoiding repetition and of thereby imposing unnecessary work on this Court, we note that the brief filed in these appeals on behalf of Owens (No. 9), contains an analysis of the above mentioned

paragraphs of the final judgment and particularly as to the effect of those paragraphs on individual defendants, as contrasted with corporate defendants. We respectfully direct this Court's attention to the portion of that brief bearing on the above mentioned paragraphs of the judgment and the hardships imposed on the individual defendants by the injunction defined by the final judgment.

As to Ball Brothers, i.e., the corporation, we contend that the above mentioned paragraphs of the final judgment are not warranted by the evidence in this cause and even though it is assumed that Ball Brothers *knowingly* and *intentionally* played some part in, or in some way contributed to a conspiracy such as is charged by the complaint. In connection with patents and inventions, we note that Ball Brothers' patents and inventions are involved in this cause only because some such patents and inventions are referred to in the license agreement (Ex. 199). We also note again that Hartford never acquired a right under or an interest in any of the Ball Brothers patents and that there is no evidence in the case which is to the effect that any patent or any invention, owned by Ball Brothers, contributed to any restraint of trade, reasonable or unreasonable, or any unlawful conspiracy or monopoly.

We also refer to the brief filed on behalf of the defendant Glass Container Association of America, Inc. (No. 14) as to all matters bearing on that defendant or activities of, or involving that defendant. We make this reference particularly in connection with the individual defendants G. A. Ball and Fred J. Petty. In connection with the defendant, Petty, we call particular attention to the fact that he has only been a director of the Glass Container Association since 1936 and of

Ball Brothers since September 21, 1935 (Finding 615, R. 7398 X).

The Final Judgment Not Only Imposes Restrictions on These Appellants as to the Use of Their Property But Has Also Imposed A Penalty on Ball Brothers

Prior to the trial of this cause, to wit: on October 18, 1940, a supplemental answer was filed on behalf of Ball Brothers and of the Ball defendants. This supplemental answer sets forth the release of the Knox companies and the Brockway Company from all obligations to Ball Brothers in connection with the production, distribution and sale of fruit jars. It also sets forth the fact that the agreement of March 25, 1933 (Ex. 199) had been amended and that Hartford had been released from its obligation not to grant additional licenses under its feeder patents for the manufacture of fruit jars and that Ball Brothers had been released from its obligation not to sell inventions relating to glass feeding machines without first offering the same to Hartford (R. 343-5 I).

The record in this case discloses that the amendment to the agreement of March 25, 1933 was accomplished by the so-called settlement agreement of August 1, 1940 (Ex. 5026; Finding 513, R. 7379 X). Thus it is apparent that even before the trial of this cause, the Government was notified of the changed conditions, as to Ball Brothers and the Ball defendants, and Exhibit 5026 discloses that the Government knew all the circumstances of the settlement between Hartford and Ball Brothers at least during the trial of this case.

As previously noted, this settlement involved the payment of $425,000 by Hartford to Ball Brothers. As

has also been stated, paragraphs 44 and 58 of the final judgment in effect, direct Ball Brothers to pay over to the Clerk of the District Court $425,000, *to be impounded * * * subject to further order of the Court, pending the determination of the receivership of Hartford.* There is nothing in the record which provides a basis for this order. It is, of course, apparent that the complaint, as originally filed, did not refer to the settlement agreement of August 1, 1940. On the other hand, it is noted that the Government did not amend its pleadings in an effort to provide a basis for the order.

Aside from all this, the fact remains that Ball Brothers was, in effect, directed to pay and, therefore, did pay $425,000 to the Clerk of the District Court. In compliance with the order, this payment was made within ten days of October 8, 1942 and consequently Ball Brothers has been deprived of the use of that money since the date of the payment.

For this reason we contend that the above mentioned order imposed a penalty on Ball Brothers and we submit that the order itself, violates legal principles laid down by this and other Federal Courts in cases similar to the present case. It is clearly apparent that the order had the effect of taking Ball Brothers' property under conditions such that Ball Brothers had no right of appeal before fulfilling the requirement of the order. We submit that even though the payment to the Clerk was only for the purpose of temporarily impounding the money so paid, the fact remains that a penalty has been imposed on Ball Brothers because it is being deprived of the use of property so impounded.

The suggestion that this fund is only temporarily impounded, just does not make sense. The order is meaningless unless the Court intends to permanently

deprive Ball Brothers of its property. If this is the intent, then we have a situation wherein a Chancellor in Equity has not only imposed a penalty on a defendant in a civil suit under the Sherman Act, but has also fined that defendant in the amount of $425,000.

We submit that the law does not contemplate imposing either a penalty or a fine in a case such as the present case. The only provision for a forfeiture of property is set forth by section 6 of the Act of July 2, 1890, 26 Stat. 210; 15 U.S.C. Sec. 6. This section, however, makes it clear that the property involved must be in the course of transportation from one state to another or to a foreign country and that the forfeiture is to the United States. So far as we can find *United States v. Addyston Pipe & Steel Company* (6th C.C.A.) 85 F. 271, 301-302 is the only case bearing on this point. It contains the following:

> "The prayer of the petition that pipe in transportation under the contract of association be forfeited in a proceeding in equity like this is, of course, improper, and must be denied. The sixth section of the anti-trust act, after providing that property owned and in transportation from one state to another or to a foreign country under a contract inhibited by the act 'shall be forfeited to the United States,' continues 'and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.' This requires a like procedure to that prescribed in sections 3309-3391, Rev. St., and involves a trial by jury. *The only remedy which can be afforded in this proceeding is a decree of injunction.*" (Emphasis ours)

The case from which we have quoted was appealed to this Court and was modified, but as to another point

(Addyston Pipe & Steel Co. v. United States 175 U.S. 212, 20 S. Ct. 96).

While the case of *Standard Oil Co. v. United States* 221 U.S. 1, 77-78; 31 S. Ct. 502, 523 does not involve a situation such as here, nevertheless, we note that this Court in deciding that case said:

> "As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extention and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.
>
> "In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

Thus we submit that the law, as interpreted by this Court, contemplates remedies but not penalties. With this viewpoint, we contend that the District Court far exceeded its judicial discretion in ordering Ball Brothers to pay the above mentioned sum of money to the Clerk, whether for impounding or for some other purpose. The transaction between Ball Brothers and Hartford

under which a like sum had been paid to Ball Brothers, had long since been completed when the order was made. The question of funds or property moving from one state to another or even from one party to another is in no way involved. Ball Brothers paid *its money* to the Clerk in compliance with the order, consequently the order had the effect, and could only have the effect of depriving Ball Brothers of its property, i.e., compelling a forfeiture.

We also note that the forfeiture to which Ball Brothers has been subjected has not benefited the public or improved competitive conditions. As a matter of fact, it can be strongly argued that the tying up of the funds in question has been detrimental to the public interest. It certainly has not improved Ball Brothers' competitive position in the glass container industry.

We submit that paragraph 44 of the final judgment and the portion of paragraph 58 of that judgment bearing on paragraph 44 should be stricken from the judgment.

Conclusion.

In conclusion, we submit that there is nothing in the record which discloses or indicates that Ball Brothers knowingly violated the Sherman Act or the Clayton Act. There is nothing in the record which discloses or indicates an intentional violation of the acts as to its patents or applications for patents. We also submit that in accepting a license under the Owens patents and in operating under that license, it neither violated the law nor disclosed an intent to violate the Sherman Act or the Clayton Act.

Monopoly is the purpose of the patent statutes of the United States. The clear intent of those statutes

is that someone is to be specially benefited by each patent monopoly granted to an inventor. The law contemplates the assignment by inventors of patents granted to them. The right of an owner of a patent to grant exclusive and non-exclusive licenses under the patent has been recognized since the very early days of our patent laws. With all this in mind, we submit that a far-seeing manufacturer who invests money in an invention, a patent or a license to use a patented invention, can neither be criticized nor condemned and even though it is apparent that his investment was made for the purpose of obtaining some commercial advantage over his competitors.

A patent monopoly is relatively short as time is measured in the life of a nation or even in connection with commercial transactions, consequently the competitive advantage acquired by reason of a patent monopoly is limited in point of time. That is to say, the advantage is limited to the period of the patent monopoly by which it is obtained. We, however, submit that the acquiring of such an advantage by the purchase of a patent or patents or a license under patents, is not in itself illegal nor subject to condemnation.

Ball Brothers and many other glass manufacturers took advantage of the patent monopolies growing out of the Owens inventions. History and the record in this case disclose that those inventions involved a long step forward in the art of producing glass containers. Ball Brothers paid for its license under those Owens patents and, we concede, it acquired the license with the thought and hope that it would be benefited commercially by the acquisition. To concede also that it was benefited by the license and that its exclusive right to use the Owens inventions in the manufacture of fruit jars gave it a commercial advantage over its competitors, does not concede an unlawful act or a wrongful intent.

From the standpoint of Ball Brothers, this suggestion applies also to its license under the Hartford feeder patents. In commenting on this angle of the case, we frankly concede that Ball Brothers was antagonistic to Hartford and to Hartford's patents. It built its own feeders and it used those feeders in the face of the fact that Hartford was prosecuting others for infringement of its feeder patents. Ball Brothers accepted a license under Hartford's patents only after three Circuit Courts of Appeals had held some of those patents valid and infringed. If, as we contend, Ball Brothers had a legal right to acquire a license under patents which had been upheld as valid patents by the courts, the law was not violated by Ball Brothers when it accepted a license—in the nature of an exclusive license—under Hartford's feeder patents and even though the exclusive feature of the license was limited to one field of endeavor. If we are correct in this, then, we submit, that no unlawful act was committed and no illegal purpose was disclosed by Ball Brothers' demand for the best license it could get for the money it was to pay.

From the foregoing, it is apparent that we are of the opinion that the patent statutes and the portion of the Constitution under which Congress finds its authority to grant patents, occasioned the situation which confronted Ball Brothers prior to March 25, 1933, the date which the Government alleges it joined a then existing conspiracy. Long prior to that date Ball Brothers had been threatened with suit for infringement of Hartford's feeder patents. Insofar as Ball Brothers knew, it had to decide between one of two courses of action. In its opinion, it had to defend itself in a suit under patents which had been sustained by courts of competent jurisdiction or it had to accept a license under those patents. There is nothing in the record which indicates that Ball Brothers had knowledge of any unusual conditions in-

volving the Hartford feeder patents or Hartford's activities in connection with those patents. With this in mind, we, therefore, submit that it was not unlawful for Ball Brothers to make the best deal with Hartford that it could make under the circumstances of the situation, i.e., as those circumstances were known to Ball Brothers. For this reason, we submit and contend that Ball Brothers' desire for, and acquisition of Hartford's *residual rights as to fruit jars* was the natural result of established practice under the patent laws of this country.

Having obtained a license coupled with a covenant that Hartford would grant no further licenses to use its feeder inventions in the manufacture of fruit jars, it was not only reasonable but it was also logical for Ball Brothers to protest when Hartford failed to deliver to it that which it had bought and paid for. We, therefore, submit that Ball Brothers' protests to Hartford as to the use of Hartford's inventions—in the manufacture of fruit jars—by Hartford licensees not having the right to so use such inventions, cannot be considered as a violation of the Sherman Act or as indicating a wrongful intent. Likewise, we suggest that Hartford had the legal right and was contractually obligated to prevent the unlicensed use of its feeder inventions in the manufacture of fruit jars. It, therefore, cannot be condemned for attempting to fulfill the obligation to Ball Brothers growing out of the so-called *residual rights.*

In view of all this, we submit that Ball Brothers' activities which involved patents and licenses under patents, neither connect it with a conspiracy nor involve it in any unlawful transactions.

As previously pointed out Ball Brothers entered into the settlement agreement of August 1, 1940 (Ex.

5026) and released the Knox companies and the Brockway Company in an effort to avoid, as far as possible, the continuation of those things criticized and condemned by the complaint. It is, therefore, submitted that whether or not these transactions were in themselves unlawful, contributed to an existing conspiracy or in themselves constituted acts of conspiracy, the issues as to them are now moot and, we therefore, pass to a brief reference to the final judgment.

Insofar as Ball Brothers and the Ball defendants are concerned, the final judgment shows on its face that it extends far beyond the charges of the complaint. It imposes restrictions on Ball Brothers and the Ball defendants which are neither merited by the activities of those appellants or by the charges of the complaint as to them.

As we have pointed out, the order of injunction is unnecessarily drastic as to each of these appellants even though it is assumed that the charges of the complaint as to them have been proved. We also urge that the order of injunction is such as to deprive these appellants, and each of them, of their individual rights as citizens. It will hamper them in the lawful conduct of their business and this statement refers to the individual defendants as well as Ball Brothers. The order of injunction is so broad as to patents and patent activities, that it will have the effect of preventing Ball Brothers and each individual defendant from obtaining the ordinary benefits to be derived under the patent statutes of this country, not only in connection with existing inventions relating to glassware and glass-making machines and procedures but also in connection with future inventions and inventions which are in no way connected with glassware and the production of glassware. The restrictions and limitations as to this are

not limited as to time, will outlive the individual defendants and will impose a continuing hardship on Ball Brothers in its effort to lawfully conduct its business under present and future competitive conditions.

While we urge that the judgment and the order of injunction contained therein are unreasonably drastic, exceed the requirements of the law and are confiscatory, we also submit and urge that, upon the law and the evidence and for reasons hereinbefore stated, the judgment of the District Court should be reversed, a final judgment favorable to these appellants should be entered and the complaint herein should be dismissed as to these appellants and each of them.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

The Sherman Anti-Trust Act of July 2, 1890, as amended, Sections 1, 2 and 4, 26 Stat. 209 as amended by 36 Stat. 1167 (15 U. S. C., Sections 1, 2, and 4):

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint or trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain

such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The Clayton Act of October 15, 1914, 38 Stat. 731 and 736 (15 U. S. C., Sections 14 and 25):

"Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, ware, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce"

"Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent

and restrain such violation. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.